THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 847 J.R.]

BETWEEN

M.M.S. (SRI LANKA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

THE REFUGEE APPEALS TRIBUNAL, IRELAND AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 13th day of October, 2015

1. This telescoped hearing seeks an order of *certiorari* of the decision of the first named Respondent which affirmed the recommendation of the Refugee Applications Commissioner ("the Commissioner") that the applicant should not be declared a refugee and seeking a fresh determination by a separate member of the Refugee Appeals Tribunal ("the Tribunal").

Grounds upon which relief is sought
2. The grounds upon which relief is sought are:

a. The decision was arrived at in breach of fair procedures and natural justice. In particular, without prejudice to the generality of the foregoing, the grounds of appeal put forward by the applicant were not addressed in the decision. It is insufficient to reject a claim such as the applicant's on "pure credibility grounds" in circumstances where proper examination of the documentation lodged would have revealed that, regardless of any "credibility" issues, the applicant would or might suffer persecution to a level sufficient to entitle him to international protection if returned to Sri Lanka, merely on account of his being a failed asylum seeker and/or a Sri Lankan Tamil. In this regard there was no proper objective assessment of the applicant's claim and there was a breach of paras. 67 and 194 of the UNHCR Handbook, a breach of the applicant's "right to be heard" pursuant to domestic and European law and a breach of article 5 (1) of the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations").

b. Without prejudice to the generality of the preceding ground, no proper regard was had to the following grounds of appeal raised and no reason or rationale was provided for the apparent rejection thereof:

> i. The details of the cases put forward by the applicant. These examples of treatment of others were relevant yet ignored.
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> ii. The contents of the SPIRASI report were given no weight by the Tribunal and no proper reason was provided for this.
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> iii. The prospective risk of persecution was not assessed by reference to the information and the documentation furnished.

c. The process by which the applicant's application was dealt with was flawed and should be quashed. The "credibility" of the applicant's claim was incorrectly addressed. The Tribunal member seemingly adopted, but did not apply, the test mentioned by Kelly J. in *S.C. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 26th July 2000). No consideration took place of whether the applicant's version of events "could have happened". The rejection of the applicant's claim appears to be based purely on a gut feeling of the decision-maker as to the plausibility of the applicant's claim without any objective analysis of the applicant's claim by reference to up-to-date and relevant country of origin information from appropriate sources.

d. "Credibility" was not assessed in accordance with the requirements of the UNHCR Handbook and the Directives (Qualifications and Procedures). The personal view of the decision-maker as to whether to believe the applicant is not relevant to a proper assessment of credibility in the sense required by the Directives.

e. No regard was had to article 5 (2) of the Regulations of 2006 in the assessment of the applicant's claim.

f. No proper reason or rationale is provided for the rejection of the applicant's claim

g. No prospective objective assessment of the applicant's claim took place.

h. The information put before the decision-maker, particularly as regard to harm which might be occasioned to the applicant if he were to be deported should, at least, put the Tribunal on enquiry in relation to these matters, but the Tribunal carried out no such enquiry thus rendering the decision invalid.

i. The Tribunal did not properly consider the medical reports submitted on behalf of the applicant. Without prejudice to the generality of the foregoing, the fact that the presence of post traumatic stress disorder ("PTSD") was "very likely" was ignored and not considered as a possible explanation for any of the alleged inconsistencies in the applicant's account.

3. The applicant swore an affidavit for the purposes of verifying the facts set out in the statement to ground the application for judicial review and he avers that he applied for asylum in the State and detailed the history of the findings by the Refugee Applications Commissioner and the decision of the Refugee Appeals Tribunal. He also referred in this affidavit to the following:

a. Medical report of Dr. Kieran Leonard dated the 29th of April, 2013 and the photographs referred to therein.

b. The application for refugee status questionnaire (translation) dated the 3rd of December, 2012.

c. The report of the Refugee Applications Commissioner dated the 27th of May, 2013.

d. The additional grounds of appeal dated 27th August, 2013.

4. He also sought an extension of time in which to initiate the proceedings. It should be noted that the Respondent did not oppose the necessary extension of time.

The Refugee Appeals Tribunal – the applicant's claim
5. At the beginning of the decision by the second-named respondent, he states that "for avoidance of doubt, the Tribunal would reiterate that what follows in this section is a summary of the relevant evidence tendered by the Appellant at his oral hearing only." The additional evidence submitted orally by him at the s.11 interview can be found in the transcript of the interview.

6. This Court has repeatedly complained that the Court never obtains a copy of the evidence in chief in the cross-examination together with any questions posed by the Refugee Appeals Tribunal. In this case it is quite clear from the second-named respondent that all that is provided is a summary of what the second-named respondent believed to be the relevant evidence tendered by the Appellant at his oral hearing and thus any judicial review challenge to the decision of the Tribunal in this case is therefore limited in an unsatisfactory way by the failure by the Refugee Appeals Tribunal to provide the details of the relevant evidence tendered by the Appellant. This is a serious handicap, in particular in a case of such importance as this. The Court will deal with this issue later in the judgment.

7. The second-named respondent stated that the Appellant claimed that he was a Tamil maths teacher. He said he met a distant cousin of his, R., in June 2005. He was a member of the Intelligence Division of LTTE (Liberation Tigers of Tamil Eelam). This person allegedly warned him off against having any association with PLOTE (Peoples' Liberation Organisation of Tamil Eelam), a pro-government party. The applicant said he unwittingly gave information on V. to this cousin in December 2006. V. was subsequently murdered. The second-named respondent stated that "the Appellant tasked his cousin on this murder." His cousin told him that this person had allegedly raped three girls and deserved to die. The Appellant said he feared the LTTE as he felt they may be under the impression that he was a witness to the murder of this man. He then said that five PLOTE members were also allegedly murdered by the LTTE on the basis of the information he had provided to R. The second-named respondent said that the applicant stated how in 2009 he got into a fight with a man called S. over his girlfriend A. This man happened to be a PLOTE member. As a result he contended that the PLOTE began persecuting him. He said that they had called to his parents' home looking for him and told his parents they were from the PLOTE. He said that he then went to the United Kingdom for about a year. He said that he had not been in contact with his parents while he was in England. He went to the UK on a student visa. He said his girlfriend informed him in 2011 that S. had raped her in 2009. He said he only obtained his girlfriend's phone number from his mother in 2011. The Appellant said that his brother-in-law told him that S. had died in 2010. He returned to Sri Lanka in 2012 as he felt compelled to marry A. and was aware of an amnesty. He said he was arrested at the airport on his way back in by PLOTE members. He was suspected of LTTE membership and was interrogated about R and S.'s death, his cousin's alleged involvement in the LTTE and the general opinion of Sri Lanka in the United Kingdom. He never claimed asylum in the UK as he had a visa for a college there. It turned out to be a bogus college which was closed by the British Government soon after he arrived in England. He said he then went to Moscow on a false passport on a business visa for six months with a trafficker. He then travelled by land and ferry to Ireland from Moscow. He told the presenting officer that he used a false name of F.K. He worked for nearly two years in England. He confirmed that his visa for Britain had expired. He did not know how his brother-in-law knew he had been detained in the airport on his way back from the UK. He confirmed that he had not been in contact with his cousin, R., since 2009. He did not know what his cousin did for a living when asked. He said the LTTE had been wiped out in 2009. He confirmed that photos of his alleged wounds had been taken in Dublin shortly he had first arrived by a friend of his. When asked about this friend, the Appellant could not or would not provide any details. He was asked why he did not have A.'s phone number with him while he was in England. He explained it was because his brother-in-law had taken his mobile phone from him as he thought it would be too much hassle. The second-named respondent noted that the applicant's lawyers submitted various country of origin information and written submissions to the Tribunal. The outline by the second-named respondent of the applicant's claim is of course based on what is described by the second-named respondent as a summary of the relevant evidence tendered by the Appellant at his oral hearing.

Analysis of the applicant's claim
8. At the beginning of the analysis of the applicant's claim, the second-named respondent stated that in order to qualify for refugee status, the applicant had to satisfy a number of criteria. He stated that a useful summary of these criteria were set out in the Australian High Court in Minister for Immigration and Multicultural Affairs v. Khawar [2002] HCA 14 where Callinan J. stated:

> *"Although the definition must be read as a whole, each of its elements must be present: the existence of a well-founded fear of being persecuted; for reasons of race, religion, nationality, membership of a particular social group, or political opinion; and, the inability, or, because of the existence of the requisite well-founded fear, an unwillingness to avail herself of the protection of the country of her nationality."*

9. The second-named respondent stated that it was claimed that the events leading to the applicant's fear of persecution date back to the period before he left Sri Lanka for the United Kingdom and the reason he left Sri Lanka primarily was to flee such an alleged persecution owing to an alleged well-founded fear of same. However the Appellant voluntarily returned to Sri Lanka from the UK in 2012. The applicant then said that the reason he voluntarily returned from the UK in 2012 was that he had been "informed by the media that the problems were resolved in Sri Lanka". The Appellant's purported reason for returning to Sri Lanka from England is not credible given that his alleged problems were on a very personal level with a particular PLOTE member called S, whom he antagonised because he was "making moves" on his girlfriend, who was not connected to any generalised political situation. The second-named respondent said he was satisfied that the applicant's actions in returning to Sri Lanka did not evince such a well-founded fear of persecution and the explanations therefore do not overcome this credibility difficulty. In fact they undermine the credibility of his claim. The second-named respondent also found the Appellant's account of his contact, or lack of it, with his girlfriend to be incredible. He contended that another reason why he returned voluntarily to Sri Lanka in 2012 was to marry this girlfriend. However, he also said that he had not been in contact with her at all between leaving the UK in 2009 and late 2012. In the interim it is alleged that she had been raped by S. and his cohorts and that the applicant's brother-in-law had phoned him to tell him this in 2010. When

he was asked why he had not rung his girlfriend in this period, even after he had been told that she had been raped, the Appellant's explanation was that his brother-in-law had confiscated his phone before he had left for the UK. However it was clear that the Appellant had a phone while in the UK as he had rung, *inter alia,* his mother and brother-in-law from there. Moreover when asked how he would have been able to eventually ring his girlfriend, the applicant said that he found because he had merely asked his mother for her number then, the second-named respondent said that he found the whole scenario to be implausible.

10. The applicant contended that he had been detained by the CID (Criminal Intelligence Department) and PLOTE immediately on his arrival at the airport in Sri Lanka from the United Kingdom and held incommunicado for up to eight days, not even being afforded the benefit of contact with a lawyer. However, somehow his brother-in-law knew that he was being held by PLOTE and arranged his escape. When asked, the Appellant could offer no explanation as to how his brother-in-law knew that the Appellant was being held by the PLOTE, not to mind how he managed to bring about such a daring intervention. When asked to explain his ignorance of this remarkable intervention, the applicant said he did not bother to ask his brother-in-law how he came to know that the he was being held by PLOTE.

11. The applicant's account of his alleged detention by both CID and PLOTE on his arrival back in Sri Lanka was, according to the second-named respondent, also riddled with inconsistencies and contradictions. For example, at one stage he stated that they were accusing him of murdering S. S. died in 2010. He also contended that they accused him of being involved in seditious activities in England at the time when he was supposed to have murdered S. back in Sri Lanka.

12. The second-named respondent said that he was satisfied that the Appellant was never detained or interrogated by either the CID or PLOTE and that they had no interest in the Appellant.

13. The second-named respondent said that he had considered the SPIRASI report. The examining physician reported that the Appellant said he was "deeply immersed in PLOTE" for a period. This is wholly at odds with what the Appellant told the Tribunal, which was to the effect that he was never a member, never engaged in politics or political activities, either in Sri Lanka or in the United Kingdom, and was not in fact interested in politics. While he had an acquaintance with certain people who happened to be PLOTE members, he only socialised with them on a purely non-political level, for example to play cricket.

14. The second-named respondent said that the examining physician reported that the Appellant told him that he had heard indirectly through his brother-in-law that his girlfriend had been abducted and raped and that sometime later his brother-in-law informed him that S. had met a violent death. Again this is wholly at odds, according to the second-named respondent, with the account provided by the Appellant to the Tribunal wherein he alleged that he had been told firstly of the alleged rape of his girlfriend, and only afterwards that S. had been one of the perpetrators and that he had subsequently died. He also told the examining physician that he was detained at the airport and immediately spirited to a PLOTE camp by two burly men in a van. Again, this is at odds with what he told the Tribunal. He told the Tribunal – (although what he told the Tribunal is merely "summarised".) – that he was detained in the first instance by the CID at the airport and offered them his money. After the CID had finished their interrogation of the Appellant after two days they then conveyed him to a PLOTE camp.

15. The second-named respondent said the history as recorded in the medical record as to how, by whom and the reasons why the Appellant came to have been injured in receiving scars, far from corroborating the Appellant's claim as advanced to the Tribunal, actually undermined the applicant. The second-named respondent stated that this highlights the dangers inherent when submissions and professional witnesses stray into the realms of advocacy. He noted there was a marked note of passionate conviction about the report. He indicated that this was probably due to inadvertence on the clinician's part.

16. He then said that that the second named respondent stated that they felt that the purely clinical findings in the report had to be considered. They are to the effect that the appellant had been subjected to psychical abuse by someone. Despite the second named respondent indicated that because there was no timeframe provided in which the injuries occurred, it did detract from its corroborative value as to the particular claim being advance and he gave no weight to this report as an item of corroborative evidence of the asylum claim advanced.

17. The second named respondent also upheld the credibility findings made in the s. 13 report on the basis that "it has appeared that the applicant was able to freely leave Sri Lanka in 2009, despite his assertion that he has assisted in various assassinations".

18. The second named respondent said he saw no reason to upset the finding elsewhere in the s. 13 report, to the effect, that the credibility of the claim for asylum was undermined by the fact that the Appellant did not lodge an asylum application in the United Kingdom. He said his explanation for this failure ran quite hollow particularly given the obvious fact that the student visa was for a temporary period only and he would not have been able to rely on same for more than a couple of years.

19. The second named respondent also said he would uphold the credibility finding made later on in the s. 13 report to the effect that his alleged persecutors would accept a bribe from his brother in law to secure his release immediately after going to the trouble of detaining him at the airport and torturing him on suspicion that he had been spreading dissent and agitation against the regime abroad. He described the whole scenario as "ludicrous".

20. The second named respondent said that in assessing the credibility of the applicant as to the well founded fear of persecution, the Court has had regard to the consideration by Kelly J. in the High Court in S.C. of the relevant paragraphs in the office of the United Nations High Commission for Refugees: *"Handbook and procedures in criteria for determining refugee status."*

21. Kelly J. stated in the above case:-

> *"From the foregoing, it is clear that an applicant's credibility is always a relevant issue which falls to be assessed by the examiner."*

He quotes from Goodwin-Gill ("The Refugee and International Law", Clarendon Paperbacks, Oxford) at page 349,:-

> *"Simply considered there are just two issues. First, could the applicant's story have happened or could his or her apprehension come to pass on their own terms given what we know from available country of origin information? Secondly, is the applicant personally believable? If the story is inconsistent with what is known about the country of origin then the basis for the right inferences has been laid. Inconsistencies must be assessed as material or immaterial. Immaterial inconsistencies go to the heart of the claim and concern for example, the clear experiences that are the cause of flight and fear. Being crucial to the acceptance of the story, applicants ought in principle to be invited to explain contradictions and clarify conclusions."*

22. The second named respondent stated that he was not satisfied that the applicant had discharged the burden on him. He affirmed the recommendation of the Refugee Applications Commissioner made in accordance with s. 13 of the Refugee Act 1996 (as amended).

Submissions by counsel for the applicant
23. Counsel for the applicant, Rosario Boyle, S.C., with Paul O'Shea, B.L., reviewed the background to the applicant's case and stated that the applicant had consistently told the same story since lodging his claim for asylum on 17th August, 2012 and she outlined the history of the applicant's movements and that of his claim and movements.

24. She noted the errors in translation of the s. 8 interview and emphasised the contents of Dr. Ciaran Leonard's report. She also mentions the report of Ms. Liliama Morales dated 19th October, 2012, which was also furnished to the Office of the Refugee Applications Commissioner. Ms. Morales stated that the applicant:-

> *"Presents with a pattern of symptoms typical of a traumatising event or events producing fear from the inability to feel safe. He would continue to attend the service for the foreseeable future. "*

25. Counsel then referred to country of origin information published by Human Rights Watch and other organisations since 2012 in relation to arbitrary arrest, detention and sexual violence perpetrated against suspected LTTE sympathisers, by members of the Sri Lankan security forces. The report documents 75 cases of rape, 35 of them of men, based on in-depth interviews over a twelve month period of former detainees. According to the report, there was supporting medical evidence in 67 cases.

26. She also noted that a number of cases "*involved individuals who were returning to Sri Lanka from abroad because they had been deported or had voluntarily returned".* Many pointed to the role played by such groups as PLOTE who "*acted in conjunction with security forces by providing information".* Interrogations were frequently conducted by teams in the "*torture including sexual abuse took place in interrogation rooms that appear to be frequently used for torture as there was often blood stained visible torture instruments".*

> *"Since the end of the armed conflict, other Tamils, living abroad returned to Sri Lanka to be arrested immediately or soon after arrival and they too have been subject to torture, including rape, while in custody. A number of these were questioned about alleged activities abroad including peaceful criticism of the Sri Lankan Government."*

27. In relation to the s. 13 report, counsel noted that if the applicant's story was true, it would be a severe violation of his human rights that the country of origin information would support his contentions generally and that state protection might not be a viable option. The Commissioner in relation to the SPIRASI report acknowledged that the integrity of the report written by "*a qualified senior physician*" was above reproach and it noted the references to the scars had been highly consistent and typical of the trauma described. Obviously, the Commissioner noted that Dr. Leonard could not say who did this to the applicant or why or whether it is likely to happen should he return again and that the report had not outlined a timeframe.

28. Counsel referred to the notice of appeal and the detailed grounds of appeal with the history of the conflict in Sri Lanka being set out including the 2002 peace process, its breakdown in 2005 and the military defeat of LTTE in 2009. She also pointed out that the strength of evidence produced by Human Rights Watch and other organisations since 2012 in relation the arbitrary arrests, detention and sexual violence perpetrated against LTTE sympathisers.

29. She noted that several courts in the UK had suspended the deportation of Tamils considered as falling within that category. Submissions were made in the notice of appeal in respect of each of the seven adverse credibility findings made by ORAC and its redaction of the SPIRASI findings. The notice of appeal also noted the decision in RMK *(DRC) v. RAT* [2010] IEHC 367, where Clark J. had held that in the absence of an express finding that an applicant did not fall into a particular risk category and a failure to assess and determine the possibility of prospective risk of persecution would result in *certiorari.*

30. In relation to the Tribunal decision, counsel on behalf of the applicant referred to *"a summary of the relevant evidence"* which points to the paucity of the issues relating to the applicant's interrogation and to what the applicant claims to have suffered over eight days in early 2012 at the hands of security forces aided by PLOTE members.

31. She pointed to the analysis of the applicant's claim and stated that it contained a number of adverse credibility findings. She listed the first credibility finding as "*His purported explanation"* for returning to Sri Lanka from England as not credible. She stated that the finding was made without any consideration to the evidence consistently given by the applicant, including the Tribunal member himself, the effect that as a result of information given to his distant cousin or the five people who had been murdered by the LTPE. Of course, the Court does not have the benefit of the full evidence of the claim made by the applicant.

32. The second credibility finding was that the applicant's lack of contact with his girlfriend *"to be incredible"* and "*the whole scenario to be implausible".*

33. The third credibility finding related to how his brother in law knew that he was being held by the PLOTE and how he managed to affect such an intervention. Counsel submitted that the second named respondent did not appear to have considered the country of origin information before him to the effect that Freedom from Torture had found that in the 35 cases analysed in its December 2011 report, every individual had escaped from detention by bribing officials. The applicant inconsistently stated that during the interrogation he had been asked who had murdered S. and had, in fact, been accused of arranging to have S. killed with the help of R.

34. Counsel noted that having made these "*untenable"* findings, the Tribunal member then proceeded without considering the SPIRASI report, Ms. Morales' report or any country of origin information to reject the core claim of the applicant saying, "I am satisfied that the applicant has never been detained or interrogated by either CID or PLOTE, that they had no interest in the applicant." In doing so, she submitted the second named respondent had fallen into both factual and legal error and that his findings, could not stand.

35. She also noted that the second named respondent had rejected the claim in its entirety, he continues to go on to consider what he says is "*colloquially"* known as the "*SPIRASI report".* He lists three items from the account given by the applicant to Dr. Leonard because they allegedly conflicted with the evidence to the Tribunal (a copy of which the Court does not have), they have failed to undermine his claim. The first is to the effect that he had told the doctor that he had become immersed in PLOTE. He told the Tribunal that he was never a member and only associated with the PLOTE members. Counsel submitted that no allowance was made for the fact that a different interpreter was present each time the applicant recounted this story and if the Tribunal member placed such an importance on this discrepancy, he should have considered the numerous other occasions in the applicant and made it clear that he was never a member of PLOTE.

36. Counsel mentioned that the second named respondent's next inconsistency, the finding related to the timing of the applicant's knowledge of S's death and his participation in the rape of his girlfriend. She also submitted that the second named respondent failed to take in account the fact that what the applicant told Dr. Leonard was entirely consistent with what he said in his questionnaire and at his s. 11 interview. In relation the SPIRASI report, counsel submitted that the second named respondent's findings undermined the professionalism and objectivity of Dr. Leonard.

37. In relation to the test propounded by Goodwin-Gill in *Refugee and International Law* quoted by Kelly J., counsel indicated that the Tribunal member simply ignored the first leg of the test. He did not consider whether the applicant's story could have happened given what was known of available of country of origin information.

38. Counsel quoted the decision of Clark J. in RMK (DRC), she stated:-

> *"21. The applicant's next challenge was to the rationality of the Tribunal Member's rejection of the compelling and supportive medical opinion furnished in this case where the strong personal opinion of the SPIRASI physician well versed on the Istanbul Protocol and the UN Convention against Torture (UNCAT) was that Mr. K had suffered torture. In the applicant's contention, it follows therefore that a report of such weight could only be disregarded if the primary credibility findings were of such force as to outweigh the medico-legal report. The applicant is correct in his contention.*
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> *22. There is a long line of authority on the general subject of the weight to be accorded to medical reports in asylum cases. While it is always a matter for the decision maker to assess the probative value of the contents of such reports, it is incumbent on the decision maker to provide reasons for rejecting the contents. A report which is general in terms has obviously little weight [and] requires no great explanation for its rejection. However while medical reports are rarely capable of providing clear corroboration of a claim, it is well recognised that there are occasions when examining physicians reports on objective findings and use of phrases which attach a higher probative value to those findings. Such reports are capable in an objective way of supporting the claim. Obviously, in such cases the need for reasons to be given for rejecting the probative value of the report must be more fully addressed."*

39. Counsel submitted that the second named respondent had fallen into the same error here. She also quoted from the European Court of Human Rights judgment in *R.J. v. France* (19th December, 2013) (Application No. 10466/11) in which the Court was asked to injunct France from returning a Tamil to Sir Lanka. The European Court of Human Rights held:-

> *"41. Regardless of whether the applicant's account is, as noted by competent national authorities in asylum, little substantiate both as regard financial support of the movement of the LTTE and in the conditions of his detention, the court notes, however, that he produced a medical certificate in support of his alleged allegation of ill treatment while in detention. The medical certificate from a doctrine of 'medical unit ZAPI ROSSY' while the applicant was in a waiting area described in a precise 'burn wounds a few weeks ago' and causing 'the severe pain requiring local treatment and by mouth'.*
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> *42. The court finds that this document is a particularly important piece of the file. Indeed the nature, severity and reason character of injury is a strong presumption of treatment contrary to Article 3 of the Convention imposed on the applicant in his country of origin. However, despite the presentation of this certificate, the competent national authorities in asylum rule after the application of Article 39 have sought to establish that where these wounds came from and to assess the risk revealed. The court does not consider the reasoning of the CNDA that 'the certificate dated 3rd February, 2011, cannot be regarded as justifying the existence of a link between the findings identified during the applicant's medical examination and abuse he says he suffered during his detention'. By mere reliance on the incompleteness of his story, the government does not dispel strong suspicions about the origin of the applicant's injuries.*
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> *43. Accordingly, the court considers the applicant without being effectively contradicted by the government, established the risk of being subjected to treatment contrary to Article 3 of the Convention if returned to Sri Lanka. Therefore, there would be a violation of Article 3 of the Convention in case of the return to Sri Lanka."*

40. Counsel for the applicant argued that the approach adopted by the European Court of Human Rights would be regarded as the correct test by the CJEU in the light of the recognition of the Charter of Fundamental Rights of the European Union.

41. Finally, counsel for the applicant stated that the fact that the second named respondent had decided the credibility issue without first considering important information in documents before it, including the medical and psychological reports, submissions made and country of origin information, it was submitted, quite from the frailty of most, if not all, of the adverse credibility findings, that the decision should be quashed.

Submissions by counsel for the second named respondent

42. Counsel for the respondent pointed to the affidavit of John Moffatt, a civil servant attached to the Refugee Appeals Tribunal and he swears to documents which form part of the claim of the applicant. However, it is noted that Mr. Moffatt's affidavit does not exhibit material of the hearing before the second named respondent of the claim of the applicant which again underlines the deficiency in this case. Counsel for the respondent, Ms. Cindy Carroll, B.L., reviewed the s. 8 interview questionnaire, the first s. 11 interview, the second s. 11 interview and the s. 13 report. She also mentions the matters of appeal in documentation.

43. In relation to the submissions of the applicant, counsel stated that it pointed to the four main grounds of complaint:-

> (i) criticism of the Tribunal member's credibility findings;
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> (ii) criticism of the Tribunal member's evaluation of the SPIRASI report;
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> (iii) failure of the Tribunal member to consider country of origin information and, in particular, the case studies relied upon by the applicant; and
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> (iv) the failure of the Tribunal member to consider the issue of future risks to the applicant based on his original claim and/or as a failed asylum seeker.

44. She stated that the respondent consider that this case renders entirely on the credibility of the applicant in the assessment of same, quoted the decision of Cooke J. in *MAW v. Refugee Appeals Tribunal* [2009] IEHC 30:-

> *"It is because a decision maker such a Tribunal Member has the benefit of hearing such testimony at first hand have seen the demeanour of the witness and his reaction to questioning, that this Court will not interfere with an assessment of credibility unless it has clearly demonstrated that the process by which the conclusion has been reached as been vitiated by material error".*

She submitted that the applicant had not identified any material in the assessment of his credibility.

45. Counsel also argued that it was submitted that the credibility findings accord with Cooke J's decision in *I.R. v. Refugee Appeals Tribunal* [2009] IEHC 353, and Mac Eochaidh J's decision in *R.O. v. Minister fo Justice Equality and Law Reform* [2012] IEHC 573. In relation to the SPIRASI report, counsel for the respondent said that the second named respondent is able to identify several frailties in the report and was, in fact, quite critical of the report itself. The respondents rely on the judgment of Stewart J. in *HAA (Sudan) v. Refugee Appeals Tribunal* [2015] IEHC 144. She said that as the Tribunal member examined the reports in the context of the applicant's story, it is very clear why she is rejecting the probative value of same. Also, quoted several paragraphs of Clark J's decision in RMK:-

> *"Medical evidence is not determinative of a fear of persecution for a Convention reason and must be viewed in the round with those preliminary circumstances but does not by itself neutralise negative credibility findings."*

46. In relation to future risk, counsel for the respondent said that where the Tribunal member finds the applicant absolutely incredible, he does not have to consider the hypothetical issue of future risk.

47. In relation to country of origin information, she submitted that if the applicant found to be absolutely incredible then the Tribunal member does not have to consider country of origin information or case studies.

48. She submitted that the decision must be read in the round and when it is taken as clear why the Tribunal member did not accept the applicant.

Discussion and Decision

49. The first issue which this Court must address is the decision of the second named respondent to deal with the hearing of the claim of the applicant by presenting a summary of what he describes as "the relevant evidence tendered by the Appellant at his oral hearing only". References are then made to the evidence submitted orally by him in the s. 11 interview. This Court has long criticised the Office of the Refugee Appeals Tribunal in respect of the failure to present and to exhibit the actual hearing or the details of the hearing of the evidence given by the applicant before the Refugee Appeals Tribunal. The decision in this case contains a very short summary of what took place at the hearing before the second named respondent and the reliance by the second named respondent on the evidence given therein in respect of the material which he states is inconsistent between the evidence submitted in the s. 11 interview and the oral hearing relied upon in the findings of lack of credibility. These are essential to those findings.

50. In *Meadows v. The Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 Murray CJ stated that a failure to supply sufficient reasons would effect the applicant's "constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective." He continued that a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision ought to be questioned is lawful and unless the courts in the event of a challenge, have sufficient information to determine that lawfulness.

51. In *Rawson v. The Minister for Defence* [2012] IESC 26 (Supreme Court) Clarke J. reviewed the issues of judicial review. Having regard to the case of *Meadows* he states at para. 6.9

"however where the possible basis for challenges concerned with the decision making itself then there is the potential for a greater deficit of ready information. Where the possible basis for challenge is founded on an absence of the correct question being addressed, incorrect considerations being applied or an irrational decision, any party wishing to assess the lawfulness of the decision will need to know something about the decision making process itself".

52. The Court finds in this case that the Court does not have sufficient information as to the question which the decision maker actually addressed and in those circumstances it follows in the words of Clarke J. in *Rawson* "the persons provisional right of access to the courts to have the legality of the relevant administrative decision judicially reviewed is likely to be in the words of Murray CJ in *Meadows* 'rendered either pointless or so circumstance request to be unacceptably ineffective'."

The findings of lack of credibility

53. The second named respondent found that the applicant's purported explanation for returning to Sri Lanka from England was not credible given that his alleged problems were on a very personal level with the particular PLOTE member called S. whom he antagonised because he was "making moves" on his girlfriend who was not connected to any generalised political situation.

54. The second named respondent however failed to engage with the country of origin information in relation to this finding. The Court gives some clear examples:

Refworld 17th December, 2012 "Sri Lanka's empty promises and denial of rights crisis exposed at U.N." Sri Lanka's promises on human rights should no longer be accepted by the international community, Amnesty International said as the U.N. Universal Period Review (UPR) on the 1st November, 2012 highlighted Colombo's continued denial of the human rights crisis in the country on the need for independent investigation into new alleged human rights violations in past war crimes. "Human rights defenders have stated to Amnesty International that there is a climate of fear in Sri Lanka in which the State does nothing to protect them from threat. The crackdown on dissent is extended to lawyers and members of the judiciary who speak out against abuses of power". Refworld continues "The authorities have continued to arrest and detain suspects for lengthy periods without charge or trial under the repressive Prevention of Terrorism Act, despite promises during its first UPR to bring this and similar legislation in line with international human rights law. Meanwhile hundreds of people suspected of links of the LTTE inter language are subject to administrative detention".

55. Human Rights Watch February 2013 states that "there have long been reports that the Sri Lankan military and police forces rape and sexually abuses ethnic Tamils detained for alleged links to the secessionist Liberation Tigers of Tamil Elam (LTTE) among other forms of torture and ill treatment".

56. In *Horvath v. The Secretary of State for the Home Department* [2000] UKHL 37 Pearl J. stated "It is argued that credibility

findings can only really be made on the basis of a complete understanding of the entire picture. It is argued that one can not assess a claim without placing that claim in the context of background information of the country of origin. In other words the probative value of evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin".

57. The *Horvath* principal has been cited with authority in a number of Irish cases including *Imafu v. Minister for Justice Equality and Law Reform* [2005] IEHC 416. In that case Peart J. qualifies the principle in holding that the extent (if any) to which it may be necessary for the Tribunal to refer to country of origin information as part of a credibility assessment is dependant on the facts of the individual case.

58. The failure on the part of the Tribunal of the second named respondent to refer in any way to the situation in Sri Lanka in this Courts view failed to comply with the statutory duty imposed upon the protection decision makers under regulation 5 of the 2006 Regulations. Under regulation 5, protection decision-makers must take into account "all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied and the relevant statements and documentation presented by the protection applicant. The 2006 Regulations were passed after the decision in *Imafu*. It is this Courts view that the qualification suggested by Peart J. can no longer be relied on.

59. The appellant contended that he had been detained by the CID and PLOTE immediately on his arrival at Sri Lanka from the U.K. and held *incommunicado* for up to eight days, not even being afforded the benefit of contact with a lawyer. (The second named respondent chose not to appreciate the knowledge of the legal situation in Sri Lanka). However, somehow his brother-in-law knew that he was being held by the PLOTE and arranged his escape. The first named respondent held that the applicant could offer no explanation as to how his brother-in-law even knew that he was being held by the PLOTE not to mind how he managed to affect such a "daring intervention."

60. However, the Human Rights Watch report of February 2013 stated "as noted above, all of the victims interviewed by human rights watch were able to escape from detention only by paying a bribe after they had signed a confession that was coerced under rape and other forms of torture and ill treatment". Again although this report was presented in the notice of appeal presented by the solicitor's for the applicant. It appears to have been ignored by the first named respondent.

61. In relation to the SPIRASI report of Dr Leonard dated 29th April, 2013 and the report of Ms. Liliana Morales psychologist dated 19th October, 2012 the second named respondent dismisses largely the findings of the SPIRASI report by saying "the clinician took it upon himself to comment upon and give an opinion on politics and the antipathy between the LTTE and the PLOTE in the medical report. I do not think this is an appropriate content for any medical report, particularly in the conclusions section". However while that may be a valid criticism of the enthusiasm of Dr. Ciaran Leonard, the same interest in the facts of the country of origin information in Sri Lanka would have, in the Courts view, assisted the second named respondent in arriving at a properly reasoned decision. The report of the psychologist which is brief but states that "he continues to display all of the symptoms with which he first presented. He continues to experience recurrent intrusive thoughts related to the abuse he suffered in Sri Lanka. He also continues to experience severe sleep disturbances and recurrent nightmares which are aggravated by persistent head-aches. Despite his efforts Mr. S. remains psychologically vulnerable and in need of continuing support. He will continue to attend this service for the foreseeable future". This is not commented upon at all by the second named respondent. Clearly this together with Dr Leonard's report provide considerable corroborative evidence of truthfulness of the applicant. In *Ahmed v. The Refugee Appeals Tribunal* (Unreported, High Court, 15th January, 2009) Cooke J. stated "the exercise which the adjudicating authority is required to carry out and to explain is to evaluate the totality of the information available: to weigh in the balance the different elements that tip in one direction and the other and to come to the conclusion as to the credibility of the evidence as a whole." It seems to this Court that where there is a physical piece of evidence that is capable of being related to the events claimed to have happened by the applicant the obligation is, first of all, to take that into account and then secondly to explain to the decision whether any significance was thought to attach to it at all and if not why it is discounted as against the other factors that are taken into account as elements that embellish a story otherwise based upon public events.

65. In *Kahzadi v. The Minister of Justice Equality and Law Reform*, a judgment of Mac Menamin J. (High Court) of 19th April, 2007 the SPIRASI report listed many physical findings and scars that were highly consistent and typical of the injuries that the applicant reported sustaining during the beatings or abuse that he sustained in prison. The SPIRASI report further stated that the applicant's description of detention was credible and that he had physical evidence of the reported abuses which supported his story. Mac Menamin J. did not criticise the doctor in the report for indicating that he believed that the applicant was credible. It appears to this Court that the second named respondent failed to consider the psychologist's report when warranted and dismissed the report of Dr. Leonard which in my view was an unlawful failure to give weight to it.

66. Having regard to the above findings of this Court and as this is a telescoped hearing the Court will grant leave and make an order quashing the decision of the second named respondent and directing that the applicant's appeal be determined by a different member of the Refugee Appeals Tribunal.

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Counsel for the Respondent: Cindy Carroll B.L. instructed by the Chief State Solicitor