

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 86

**Record No.: 2020/7/JR**

**BETWEEN:**

**BL**

**APPLICANT**

**AND**

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE,  
IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Ms Justice Tara Burns delivered on 3rd day of February, 2021**

**General**

1. The Applicant is a national of the Democratic Republic of Congo (hereinafter referred to as "the DRC") who on arrival within the State made an application for asylum on 19 March 2015. His application was refused by ORAC on 13 January 2016. This decision was appealed but arising from the commencement of the International Protection Act 2015 (hereinafter referred to as "the 2015 Act"), the Applicant's application for protection was forwarded to the International Protection Office who determined his subsidiary protection application against him on 13 September 2017. The Applicant appealed to the First Respondent who determined both his refugee and subsidiary protection claims against him on 20 November 2017. Thereupon, the Applicant brought an application before the Second Respondent seeking permission to remain within the State pursuant to s. 49(9) of the 2015 Act which was refused on 26 April 2018. On 5 June 2018, a Deportation Order issued against the Applicant which has not been enforced. No explanation has been placed before me as to what steps, if any, were taken on foot of the Deportation Order.
2. On 30 May 2019, an application pursuant to s. 22 of the 2015 Act was made by the Applicant seeking re-admission to the international protection process on the basis that there was a risk that the Applicant would suffer harm including imprisonment if returned to the DRC as a failed asylum seeker and/or that he would be returned to a significantly deteriorated human rights situation. An International Protection Officer (hereinafter referred to as "an IPO") made a recommendation to the Second Respondent to refuse this application. On appeal, the First Respondent affirmed this recommendation.
3. Leave to apply by way of Judicial Review seeking an Order of Certiorari of the First Respondent's recommendation to the Second Respondent was granted by the High Court on 3 February 2020.
4. The challenges to the First Respondent's recommendation are, in summary, that it:-
  - a) failed to have regard to an earlier decision of the First Respondent which was of particular relevance to the application;
  - b) found that there was no evidence before it which would suggest that the Applicant would be identifiable as a failed asylum seeker upon his return in circumstances where it was not ascertained as to how it was proposed to return to Applicant;

- c) relied on “old” country of origin and other information dating from 2012 and 2015 and failed to properly assess the Country of Origin information and the risks involved for the Applicant;
- d) concluded that the Applicant failed to meet the requirements of s. 22 of the 2015 Act;

**The Test to be met on a s. 22 application**

5. Section 22 of the 2015 Act provides inter alia:-

- “(1) A person shall not make a subsequent application without the consent of the Minister, given under this section.
- (2) An application for the consent referred to in subsection (1) shall include—... (d) all relevant information being relied upon by the person concerned to demonstrate that he or she is entitled to international protection, and (e) a written statement drawing to the Minister’s attention any new elements or findings, which have arisen since the determination of the previous application concerned, relating to the examination of whether the person is entitled to international protection.
- 4) An [IPO] shall recommend to the Minister that the Minister give his or her consent to the making of a subsequent application where, following a preliminary examination of an application under subsection (2), the officer is satisfied that—
  - (a) since the determination of the previous application concerned, new elements or findings have arisen or have been presented by the person which make it significantly more likely that the person will qualify for international protection, and 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,
- (5) An [IPO] shall recommend to the Minister that the Minister refuse to give his or her consent to the making of a subsequent application where, following a preliminary examination of an application under subsection (2), the officer is satisfied that ... paragraph (a)... of subsection (4) applies in respect of the person.”

The Act further provides that in the event of a determination pursuant to s. 22(4), an appeal lies to the International Appeals Tribunal who may affirm or set aside the recommendation of an IPO. Pursuant to s. 22(13) and (15) of the 2015 Act, the Second Respondent does not have discretion in the matter and must adopt the recommendation by the IPO or the Second Respondent, on appeal.

**The Test pursuant to s. 22 of 2015 Act**

6. Counsel for the Applicant has referred to *AA v. Minister for Justice* [2012] IEHC 63 wherein Cross J stated that “in order for the Applicant to succeed in his section 17(7) application to the Minister - providing he has satisfied the requirements of new information... what must be established is not very onerous.” (Section 17(7) of the Refugee Act 1996, as amended, mirrors the requirements of s. 22 of the 2015 Act).

7. However, the case law regarding s. 22 is far more extensive than AA. The dicta of Bingham MR in *R v. Secretary of State for the Home Department ex parte Onibiyo* [1996] EWCA Civ 1338 was endorsed by the High Court in *EMS v. Minister for Justice* [2004] IEHC 398 wherein the applicable test was set out as follows:-

“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 in 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.”

In *LH v. Minister for Justice, Equality and Law Reform* [2001] 3 IR 700, Cooke J stated at para. 23:-

“[w]hen the Minister is asked to consider an application under the subsection the essential issue to be addressed is whether the material he is asked to examine as the basis for a further application contains potentially the ingredients required to establish that the applicant comes within the definition of “refugee”. Does the material point to the possible existence of a well-founded fear of persecution; does that relate to the country he has fled; is the source a state authority or some source tolerated by state authorities; and does the reason for the persecution have a Convention nexus? While there is an obvious overlap between the ingredients of a claim to refugee status and the circumstances that may attract the prohibition on refoulement, the Minister is not, in the view of the Court, considering the possible application of that prohibition but only whether, if remitted to the Commissioner for investigation, the further application may establish that the applicant is a refugee.”

And at para. 32:-

“Accordingly, under s. 17... the Minister is only compellable to grant his consent to a new asylum application being entertained and determined when two conditions are fulfilled, namely, that new elements or grounds have arisen making it significantly more likely that the new application will be successful; and that these new elements or findings could not have been presented for the earlier application through no fault of the asylum seeker.”

8. The judgment in *PBN v. Minister for Justice* [2016] IEHC] 316 is also instructive wherein Faherty J stated at para 54:-

“The first thing to be observed is that it is not the function of the Minister to determine the applicant’s claim for refugee status on the ground of particular social group (the ground upon which the applicant sought to be readmitted to the asylum process and which formed the context of her section 17(7) review application); that function is reserved to ORAC, and, on appeal, the RAT. That remains the position

even in circumstance where the applicant has to seek the consent of the minister under section 17(7) in order to be readmitted to the process.”

9. The case law, unfortunately, refers to the test to be met in s. 22 applications in a variety of ways which are set out above. The test is variously described as not being “very onerous”; that the requirement is to establish the possible existence of a well-founded fear of persecution; that a realistic prospect of success be established; or that it is necessary to establish that the new material makes it significantly more likely that the new application will be successful. Each of these expositions raises the bar of meeting the test. Indeed, the difference between an indication that the test is not very onerous to a requirement that the material must make it significantly more likely that the new application will be successful is quite substantial. Unfortunately, the First Respondent referred to both the test not being very onerous and the requirement to establish that it was significantly more likely that the new application would be successful in its determination.
10. What is clear from s. 22 is that the determination which is at issue is whether consent should be given by the Second Respondent to re-admit an applicant to the international protection process after a negative finding has been made against him in light of new material which he could not have presented at the original application. While the exercise of making the recommendation lies with an IPO, and on appeal the First Respondent, it is ultimately, the Second Respondent’s consent which is at issue. The Second Respondent is not tasked with determining the new international protection claim and should not engage in such an analysis. Accordingly, while the Second Respondent is obliged to follow the recommendation of an IPO, or on appeal, the First Respondent, those bodies must also be careful to ensure that their recommendation does not amount to a determination of what is asserted to be a new international protection claim. That analysis is instructive in terms of assessing the manner in which the IPO, or on appeal the Second Respondent, must approach their task in this regard.
11. Having regard to the purpose of s. 22, which is whether the Second Respondent should give consent to the making of a new international protection claim, what is required to be considered by an IPO, or on appeal the First Respondent, is whether the new elements or findings which have been submitted by an applicant are of a nature which make it significantly more likely that the person will qualify for international protection. The question is not whether those elements or findings will actually result in a successful claim for international protection.

### **The Determination**

12. In the instant case, the Applicant submitted a significant amount of Country of Origin information relating to the DRC and specifically relating to the question of whether returned failed asylum seekers to the DRC faced the prospect of ill treatment and possible detention in poor prison conditions. Much of this information dated from 2010-2017. It is clear that the Applicant found support for his contention regarding returned asylum seekers within this Country of Origin information. For instance, in a RDC compilation of Country of Origin Information dating from 2012 it is stated:-

"A statement issued by the UN High Commissioner for Refugees on the treatment of asylum seekers returned to the DRC states: "According to the DGM and CNR, the usual procedure for any person returning through Kinshasa airport in case they do not hold proper documentation, including current DRC passports, and/or when they have been absent for a long time, is to be interrogated by immigration officials at the airport. In the best case scenario, they are freed within one to three hours. In the worst case, they are sent to a detention facility in the centre of town and released after further verification" (UN High Commissioner for Refugees (19 April 2006) Response to Information Request: DRC – Treatment of rejected asylum seekers, p. 1)"

13. However, in addition to what might be termed older Country of Origin information, the Applicant also submitted some newer material, namely an Unsafe Return III report dated 2019 and a disquieting report from the Guardian Newspaper dated March 2019.
14. The First Respondent found the new claim advanced by the Applicant in relation to the risk faced by him as a failed asylum seeker "to be lacking in substance, poorly evidenced and overall presented with low prospects of success". In making this determination, the First Respondent relied on decisions of the asylum tribunals in the United Kingdom in 2007 and 2015 which found that failed returned asylum seekers did not face a real risk of ill treatment if returned to DRC.
15. With respect to the newer Country of Origin information, the First Respondent discounted the Unsafe Return III report on the basis that the report related to United Kingdom returnees and not returnees from Ireland and that the report was not reliable as the author did not set out her methodology; failed to mention judicial criticism of her earlier reports; and was not objective or impartial.
16. In relation to the Guardian Newspaper report, which the Court has already described as disquieting, some portions of it were discounted by the First Respondent because of its reliance on information emanating from an organisation linked with the author of Unsafe Return III. The fact that that information is asserted to be emails between Home Office Officials and Foreign Office officials, apparently obtained by that author on foot of a freedom of information request, which emails were seen by the journalist who penned the article, is not considered by the First Respondent. The author of Unsafe Return III may have been criticised in court judgments for lack of impartiality and objectivity in her Unsafe Return Reports, but her motives or bona fides have not been questioned. No analysis is conducted by the First Respondent regarding what is presented as real evidence and this information is dismissed out of hand. Another portion of the article is identified as being capable of having weight attributed to it, although it relates to the same emails, but the First Respondent determined that that portion of the article did not displace "the more thorough and objective evidence from eg. the UK Home Office fact finding mission". Having been very careful to set out quotations from the various reports which the First Respondent wished to draw attention to throughout its determination and to unreservedly dismiss arguments made by the Applicant, no details are provided by the

First Respondent regarding what it is relying on in the UK Home Office Report, nor is any proper explanation provided as to why portions of the Guardian report which were identified as being capable of having weight attributed to them are nonetheless discounted. This is aside altogether from the fact that the UK Home Office fact finding mission, which the Court assumes the First Respondent was referring to, is dated 2012 whereas the Guardian Report is 2019. The Court fails to see how a 2012 report meets the concerns set out in a 2019 newspaper report some of which is found by the First Respondent to be capable of being given weight.

17. Having discounted the new Country of origin information, the First Respondent considered the older Country of Origin information and came to the conclusion that some of its contents had been mischaracterised by the Applicant. The First Respondent determined in relation to one of the reports "that the majority of sources indicate that once returnees have satisfactorily established their identities they are permitted to leave the airport. There is evidence that some returnees have been subjected to low level mistreatment by official, including financial extortion. Overall, however, the evidence does not indicate that there is a real risk of serious harm/persecution for returnees".
18. The First Respondent determined that the "evidence does not reach the threshold of a real risk of persecution/serious harm for all returnees."
19. It is understandable why the First Respondent engaged in a detailed analysis of the Country of Origin information. Having accepted that being a failed asylum seeker can be a ground for a successful claim for refugee status, she noted the comments of Irvine J in *FV v. Refugee Appeals Tribunal* [2009] IEHC 268 where she stated:-

"The court is conscious that there is scope for asylum seekers to abuse the statutory asylum process by making an initial unfounded application for asylum and subsequently claiming a fear of persecution as a failed asylum seeker. The making of a self-serving, unfounded initial claim must, of course, not exclude any person from the protection of the Refugee Act 1996, but it seems reasonable that it be taken into account and accorded some weight by the decision-makers when credibility is being assessed. Indeed such a person might properly be called upon to explain why they deliberately exposed themselves to a risk of persecution by creating the conditions that would make them a failed asylum seeker. Moreover, given the scope for abuse of the asylum process, the court is satisfied that cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin and demonstrating a Convention nexus would have to be shown."

However, regard must be had to the fact that *FV* was not reviewing a s. 17(7) (as s. 22 then was) application but rather was reviewing a substantive refugee determination by RAT.

20. The First Respondent proceeded to determine that the issue of being identified as a failed asylum seeker had not been evidentially established by the Applicant in any event. It

found that the Applicant had not adduced evidence in respect of the Irish system of return. It relied on a finding of the earlier IPO decision to the effect that failed asylum seekers are not identified as such when removed from Ireland. It continued:-

“As the Tribunal has no evidence before it to substantiate the Appellant’s assertion to the contrary; the Tribunal accepts the IPO’s position as set out in the decision under appeal. It is further noted that the High Court accepted the IPO’s evidence in this regard in relation to a DRC returnee. See judgment... *PBN v. Minister for Justice and Equality* [2016] IEHC 316 at para 100:

“In the course of the within proceedings, the respondent produced to the court an example of the “Laissez Passer” travel document with which returnees to the DRC are provided. From the nature of the document seen by the court I accept the respondent’s contention that the document does not disclose to the authorities in the DRC that the person to whom it is issued is a failed asylum seeker.”

21. The First Respondent unfairly characterised the position in this respect as the Applicant’s solicitor had made a request regarding this information by letter to the First Respondent dated 12 August 2019. Accordingly, while the Applicant did not produce evidence regarding his return to DRC, he had raised an issue with respect to this documentation indicating in effect that he was seeking information regarding the method of return of the Applicant. Secondly, the First Respondent made the assumption that a Laissez Passer travel document would be provided to the Applicant. It did not make any enquiry in that regard, nor did it request that the Applicant follow up on this issue with the relevant authorities.
22. Finally, the First Respondent considered the second part of the applicant’s claim, namely that the conditions in DRC had deteriorated significantly since the determination of his international protection claim so as to give rise to a significant risk of serious harm. It noted that the majority of Country of Origin information produced by the Applicant existed at the time of the original claim. It determined that the Applicant had not provided sufficient evidence which would present a significantly greater likelihood of succeeding on this aspect. The Court does not have any criticism to make regarding that specific finding.

**Review of Determination regarding safe return of failed asylum seeker**

23. Counsel for the Respondent argues that this was not a new claim made by the Applicant and in any event is one which could have been presented by him in his original application. Accordingly, it is argued that the other conditions of s. 22, namely the requirement that the material be new and that it could not have been presented in his original application, could never be made out by the Applicant. The Respondent correctly points out that the IPO in its determination regarding the international protection claim found that failed asylum seekers were not liable to ill treatment on return to the DRC. This determination was not appealed from which was noted by the Second Respondent in its international protection determination. However, the Applicant makes the point that he had not made this claim in his international protection application and accordingly had

not appealed against that finding. He further argues that he could not argue that point until he in fact became a failed asylum seeker.

24. The difficulty with the argument made by Counsel on behalf of the Respondents is that the First Respondent appears to accept that the Applicant's claim is a new claim. At paragraph 18 of the recommendation, there is reference to the ultimate question which it has to determine, namely "do the new elements presented by the Appellant make it significantly more likely that he will qualify for intentional protection". Accordingly, it seems to have been determined by the First Respondent that the Applicant's claim in the s. 22 application was indeed a "new element". Certainly, there is no consideration of these issues by the First Respondent.
25. In light of that apparent finding, it is not appropriate that the Court entertain submissions which are contrary to the findings of the determination which the Court has been asked to review.
26. I am of the opinion that the First Respondent's determination that the applicant failed to establish that it was significantly more likely that he would qualify for international protection is an irrational conclusion to have reached. Having regard to the Guardian Report alone, I am of the view that the information contained therein is of a nature which makes it significantly more likely that he will qualify for international protection. Of course, that does not mean he will ultimately succeed when the application is considered, but it is of a nature which meets the s. 22 test.
27. In that regard, I note that another s. 22 application before the First Respondent relating to a different applicant who raised a similar argument regarding being returned to the DRC as a failed asylum seeker was successful. While the decision maker in the instant case is not bound by another decision of a fellow tribunal member, the lack of consistency raises a concern when the question being determined is not whether an application will be successful in such a claim but rather whether the new claim and material make it significantly more likely that an application for international protection would be successful. The s. 22 decision is not about the merits of the claim but rather about the nature of the new claim and inconsistency on the part of the First Respondent in relation to this is regrettable.
28. Furthermore, the decision maker in the other successful s.22 decision considered other Country of Origin Information emanating from the Immigration and Refugee Board of Canada, July 2017 and a report from Alpes, Blondel, Preiss & Monras, July 2017 which raised concerns regarding returned failed asylum seekers to the DRC. This was not submitted to the decision maker in the instant case, but she was on notice of it as the other decision maker's decision was submitted to her and she refers to his decision being "relatively light in terms of its substantive reasoning" and that she does not find she "can glean much in terms of persuasive value" from it. Despite this, she fails to deal at all with this other Country of Origin information which appears to be of particular significance to the other decision maker. In light of her dismissal of the other decision maker's decision



regarding s. 22, an onus arose to set out why these reports were not of significance to her.

29. In addition, the Court is also of the view that the First Respondent's determination in respect of this aspect of the Applicant's claim is irrational in its consideration of the Guardian article, or at the very least fails to provide sufficient reasons which show a pathway as to how the dismissal of this information was reached in a rational manner. The reason for my finding is based on my analysis of how this article was considered by the First Respondent which I have set out at paragraph 16 above.
30. Accordingly, in light of the Court's findings, the Court will grant the Applicant the relief sought and make an order for the Applicant's costs as against the Respondent to be adjudicated upon in default of agreement.