

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 467
Record No. 2020/153JR

BETWEEN

GMK

APPLICANT

-AND-

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

RESPONDENTS

JUDGMENT of Ms Justice Tara Burns delivered on 2nd July 2021

General

1. The Applicant is a national of the Democratic Republic of Congo (hereinafter referred to as "the DRC"). She entered the State on 1 December 2017 and applied for international protection the following day.
2. On 17 July 2019, an International Protection Officer recommended that she be granted neither a refugee nor subsidiary protection declaration. She appealed this recommendation to the First Respondent, which affirmed the first instance recommendation on 30 December 2019.
3. Leave to apply by way of Judicial Review seeking an order of Certiorari of the First Respondent's decision was granted by the High Court on 9 March 2020.

The Protection Claim

4. The Applicant asserted that she had been a political activist for the Union for Democracy and Social Progress (hereinafter referred to as "the UDPS") political party until her departure from the DRC.
5. She asserted that her father was a freedom fighter, a human rights defender and an advocate in the UDPS party, who had been intimidated, arrested and tortured by the government. She claimed that she had joined the party when she was 18 and acted as liaison officer between her father and Voix de L'Enfant. At 22 she was elected first Vice President of the UDPS/Kenya Youth League.
6. On 20 December 2011, having returned home from a UDPS party meeting, five men with guns entered her family's house looking for her father. She heard a heated discussion between her parents and these men, after which all went quiet. Later, she was dragged out of the house and taken in a jeep to the jail of Kimbembe camp, where she was interrogated. She was released 72 hours later. When she arrived home, she discovered that her parents were not there. Her mother came home six days later, having also been taken by these men.
7. Her father was not seen again. They were told on 25 March 2012, that her father had been found dead in his cell. His body was brought to their house in a well closed casket.

8. After this, the Applicant "took up her father's torch" and was present at all demonstrations, meetings and rallies of the party.
9. On 25 July 2017 she was kidnapped by armed men who threw her in a car and slapped her. She lost two teeth. She was detained in an unknown location and held for days. On 4 August 2017, she was released in an unnamed location.
10. On 4 September 2017, four armed men came to the family's house seeking information about political groups. Their house was searched and money taken.
11. The Applicant and her mother left their home the following day and stayed for several months in hiding until they obtained the financial means for her to leave Kinshasa. Her mother remains in the DRC.
12. The Applicant claimed that if returned to the DRC she had a well-founded fear that she would suffer persecution based upon her political opinion and/or suffer serious harm. She asserted that she feared a) physical and mental violence from state forces in the DRC; b) being arrested and/or detained for attending meetings or protests; and c) prosecution or punishment as a result of both her father's and her own political activities.

The First Respondent's Determination

13. The First Respondent was of the view that the Applicant's evidence regarding her political involvement and work with the UDPS political party was vague and non-specific. It found that she was not a genuine political activist with the UDPS party in the manner as claimed. The First Respondent stated that "while she may have been a member, and/or may have taken part in demonstrations and/or rallies, and/or supported the organization generally", the First Respondent was of the view that the Applicant was not any more politically aware than an average well educated national of the DRC; used only general terminology; and had only basic information about the political situation which was already wide known. It found that it was not credible that she was not more informed about specific policies, actions and/or intentions of the party, especially given her important title and position as Vice President of UDPS/Kenya Youth League and the daughter of a prominent activist.
14. With respect to her claims that she had been arrested and detained, the First Respondent found that it was not credible that she did not know where she was detained or make any enquiry in that regard. Neither did it find it credible that she would not know or endeavor to ascertain where her mother was detained.
15. The First Respondent did not find it credible that that she did not find out where her father had died and how he had died. It noted that she was unable to give her father's date of birth despite the fact that she asserted that there was a headstone on her father's grave which noted this. In light of her not producing independent evidence of the death of her father; any information or tribute paid to him as a consequence of his alleged high profile within the UDPS party; and that she did not know whether her father's body was in fact in the casket delivered to the family at all, the First Respondent did not accept that

the Applicant's father had died and did not accept that he was a high profile leader of the UDPS party.

16. The First Respondent also found that the Applicant was not truthful in her assertions that she had no knowledge of the whereabouts of her family. It did not find it credible that she had two daughters.
17. The First Respondent did not accept the manner and nature of her alleged kidnapping. While the First Respondent accepted that the Applicant had lost two teeth, it did not accept that she lost them during an arrest or kidnapping.
18. The First Respondent accepted that the Applicant had an original expired UDPS party card (expiry date 10 January 2016) which was produced by her after her s.35 interview.
19. The Applicant had submitted a newspaper article which she asserted recorded that she was dead. The article did not in fact record this but rather that she was in exile. The First Respondent determined that this established that the Applicant had not read the article and therefore did not accept that the article was genuine.
20. In a telling paragraph regarding how the First Respondent assessed the Applicant, the decision records:-

"The Appellant presented as a very elegant, beautiful, refined, well dressed and somewhat naïve young woman, who spoke slowly, and reluctantly, and rarely if ever, looked at or addressed the Tribunal Member directly. She frequently became distressed and demonstrated frustration, and cried throughout her lengthy hearing, especially when asked questions which departed from her prepared script or account. At one point she appeared to faint, and the Tribunal adjourned for some time to enable her recovery."

21. It should be stated at this point that the Applicant does not contest the very many significant credibility findings made by the First Respondent against the Applicant, albeit that at the hearing before this Court, an analysis of alleged errors which the First Respondent made with respect to its findings was engaged in.
22. Accordingly, having analysed the Applicant's claim, the First Respondent found that the only core facts which it accepted were that the Applicant was a national of the DRC; was a Christian; was single; had only one dependent child; and was a former member of the UDPS party and a former Vice President of a youth section.
23. On the basis of those accepted facts and circumstances and having considered the relevant country of origin information (hereinafter referred to as "COI"), the First Respondent determined that there was no basis for a finding that the Applicant's fears of persecution were well founded. It stated:-

"As the facts which underpin the Appellant's fears have been rejected, there are no grounds upon which to base any feared persecution. There are also no other facts

or country of origin information which would support a finding that if the Appellant is returned to her country of origin she would face a reasonable chance of facing persecution.”

24. The First Respondent then proceeded to determine the Applicant’s subsidiary protection claim pursuant to Article 15 of the Qualifications Directive 2011/95/EU. In relation to Article 15(a) it stated:-

“The only aspect of the Appellant’s claim that have been accepted as credible is her nationality and personal circumstances, including her ethnicity and tribe. The Appellant has not claimed to fear a real risk of harm under this section in the [DRC], on the basis of her nationality and/or personal circumstances. The Tribunal notes that the Appellant has produced an old UDPS card stating that she was a member of this party. However, there is no evidence adduced or country of origin information submitted which would establish that someone by virtue of having had membership of the UDPS, in the past, would by virtue of that fact alone, be at risk of suffering the death penalty or execution in the DRC. It is accepted by the Tribunal that there is country of origin information which established that there are Human Rights abuses in the DRC. However, no evidence has been accepted that establishes on the balance of probabilities that this particular Appellant is any more at risk than any other citizen of the DRC.”

25. The First Respondent carried out a similar exercise with respect to Article 15(b) of the Directive 2011/95/EU and for the same reasons determined that the Applicant was not at risk of suffering torture or inhuman or degrading treatment.

26. The First Respondent added the following comment at the conclusion of its decision:-

“[The Appellant] was very anxious and distressed throughout her Tribunal hearing, and the Tribunal accepts that she will be distressed at the negative recommendation of this Appeal. This Tribunal would have concerns for the Appellant’s emotional well being, and mental health, and in the circumstances, respectfully requests that these factors be taken into account in respect of any humanitarian leave to remain application on her behalf. The Tribunal of course fully accepts that such views expressed are outside the remit of the jurisdiction of the Tribunal.”

Grounds of Challenge

27. The Applicant’s challenge to the First Respondent’s determination in essence is twofold. Firstly, it is asserted that the First Respondent erred in its consideration of the COI information by concluding that it was not reasonably likely that the Applicant would be persecuted or suffer serious harm if returned to the DRC having regard to the facts which were accepted by the First Respondent and/or that it failed to provide reasons for this decision. Secondly, in circumstances where the First Respondent had concerns for the Applicant’s mental health, there was an onus on the First Respondent to make

appropriate enquiries in that regard in order to be able to properly assess the Applicant's claim.

28. Rather bizarrely, mid-way through the Applicant's written submissions, and at the hearing before this Court, quite a different case was advanced by Counsel for the Applicant, asserting that the First Respondent had failed to determine a material aspect of the Applicant's claim, namely whether she had been a member of UDPS; whether she had taken part in demonstrations or rallies; and whether she supported the organization generally.
29. The basis of this claim is to be found in the following paragraph of the First Respondent's decision, which should be set out in full so that it can be interpreted correctly:-

"The Appellant stated that initially her involvement with the UDPS was as a liaison officer at the age of 18 years. At age 22, she became Vice President of the League of Youth. She claimed that her work initially was to "help her father know everything that was happening with the youth... I was also involved in going to talk in other municipalities about the UDPS. Then at 22 I became Vice President. When they found I was really engaged in fighting, the President of League of young in Katanga I was chosen and promoted to Vice President. I was engaged in UDPS fighting for each one to have his freedom and human rights fighting against all bad administration of Joseph Kabila." When asked at her Tribunal Hearing to be as specific as possible about what exactly she did, and what in particular did she mean by "fighting", the Appellant responded "I will fight for the human rights for each one of all Congolese people." The Appellant was given multiple opportunities to describe her political work and activism, but each time responded in very general terms. At a point in her Tribunal Hearing, she did indicate that after the general election in 2011 which was a "fraud", that "we refused to accept the result and we start marching and doing rallies.." This was the most specific piece of information that was provided by the Appellant throughout her hearing. When cross examined by the Presenting Officer to describe again with detail, her involvement with the UDPS, she responded "as a member of UDPS, myself and other members were shouting in the street, and this is the way we were telling the people to fight against Kabila". When it was suggested to her that she had claimed to be a Vice President, and why was she stating she was just a member, she responded "one of our aim is to be equal". The was followed by "I continue to have my normal life as a UDPS fighter until July [2017]". When again asked what is that, she stated "I continued to be a member of the UDPS and a fighter for Justice". Notwithstanding the fact that since her s. 35 interview, the Appellant has produced an original and old UDPS card, the Tribunal does not accept on the balance of probabilities, that this young refined and elegant woman was a genuine political activist with the UDPS in the manner as claimed. She may have been a member, and/or may have taken part in demonstrations and/or rallies, and/or supported the organisation generally. It is also accepted that she did not support the policies or administration of Joseph Kabila or his successor, however, it is the view of the Tribunal based on

the evidence, that the Appellant was not any more politically aware than an average well educated national of the DRS. She used general terminology, and only had basic information about the political situation, that is already widely known.... If, as her father's daughter, she was as actively involved as she claims, it is not credible that she was not more informed about specific policies, action and/or intentions of the party, especially given her important title and position as Vice President of Youth and daughter of a prominent activist. Whilst she did know the address of the HQ of the organization in Kinshasa, she confirmed that she had never visited the HQ not even when she spent three months living in Kinshasa with her cousin, prior to her departure to Ireland. On the balance of probabilities, the Tribunal does not accept that this Appellant was in any way the radical fighting activist of the UDPS as claimed."

30. This claim, that the First Respondent had failed to determine a material aspect of the Applicant's claim, does not feature in the Statement of Grounds. In fact, the complete opposite is pleaded under the heading "Statement of Relevant Facts" at paragraphs 6 and 7, as follows:-
 - "6. However several important findings were made which, to some degree, favoured the Applicant's claim and the main complaint in these proceedings is that those finding were not properly addressed by reference to evidence before the IPAT, either specifically or inferentially, in the impugned decision, and no valid or clear reasons have been provided for the rejection of her claim.
 7. The main "favourable" findings are, or appear to be, as follows 1. "She may have been a member, and/or may have taken part in demonstrations and/or rallies, and/or supported the organization generally. It is also accepted that she did not support the policies or administration of Joseph Kabila or his successor..." (pages 11/12) and 2. That she is a former member of the UDPS (Vice President of youth)."
31. In light of *A.P v. Director of Public Prosecutions* [2011] IESC 2, this Court cannot determine issues which fall outside the leave granted to seek judicial review relief. Accordingly, it would be quite improper for the Court to engage in a review under this heading. Furthermore, the Court would be placed in the impossible situation where a claim is being advanced at hearing which is the polar opposite to the facts which have been asserted in the pleadings and which underlie the claim.
32. In any event, a correct analysis of the First Respondent's decision reveals that the complaint made at hearing does not arise as it is clear that the First Respondent did determine that the Applicant had been a member of the UDPS party in light of its findings, already recited, on core facts. Furthermore, a correct reading of the entire offending paragraph, quoted above, reveals that whilst the word "may" has been used, it is clear, in light of the words "it is accepted" which follow the sentence at issue, that "may" is not being used as expressing a possibility of the events referred to occurring but rather is being used in a definitive sense where the fact that these events occurred nonetheless

does not establish that the Applicant was a genuine political activist in the manner as claimed.

33. The Respondents submissions also contend that these issues were not determined by the First Respondent, but Counsel for the Respondent submits that there was no necessity for the First Respondent to so determine as these matters were not the basis of the claim which the Applicant was making. Rather oddly, this is not pleaded in the Statement of Opposition.
34. Either way, whilst the wording of that particular sentence in the First Respondent's decision, when read in isolation, could be interpreted as it not being definitive on the question of whether the Applicant had been a member of the UDPS party, had attended rallies, and had supported the UDPS party, that meaning cannot be stood over when the paragraph as a whole and the core findings are considered. Accordingly, the Court is of the view that the First Respondent has determined this issue and agrees with the interpretation of this paragraph which the Applicant initially had pleaded in her Statement of Grounds.
35. However, the import of these findings needs to be considered as there is an assertion on behalf of the Applicant that these findings were omitted from the analysis of the First Respondent relating to the future risk of persecution or serious harm to the Applicant. That is plainly not the case. The First Respondent made a core finding that the Applicant was a former member of the UDPS and a Vice President of a youth division. Having been a member of UDPS clearly incorporates supporting the UDPS organisation generally and not supporting the policies or administration of Joseph Kabila or his successor. With respect to attending rallies, that reference must be interpreted according to the Applicant's evidence of attending rallies in 2011 and again reflects a facet of membership of a political party. Accordingly, while these findings were not specified in the core findings, they are the aspects of membership of a political party and are covered by the reference to the Applicant's former membership.

Failure to Have Regard to the COI; Coming to an irrational conclusion in light of same; Failing to Give Reasons

36. Proceeding on the basis, as pleaded by the Applicant, that the First Respondent decided that the Applicant had been a former member of the UDPS party; had attended rallies; and had supported the UDPS party generally, the complaint to be determined is whether, in light of these findings, together with a finding that the Applicant had been the Vice President of a youth division of the party, the COI reveals a reasonable likelihood of persecution or serious harm such that it demonstrates that the First Respondent either failed to have regard to the COI or came to an irrational decision. Furthermore, it is asserted that reasons have not been provided for the First Respondent's decision.
37. The findings of the First Respondent that the Applicant had been a member of UDPS party; had attended demonstrations; and had supported UDPS party generally must be considered in light of the other findings of the First Respondent regarding the Applicant's political activism, namely that she was not the radical fighting activist of the UDPS party

as claimed, and that she was not any more politically aware than an average well educated national of the DRC thereby implying a minimal level of engagement with the UDPS party. Furthermore, the First Respondents findings with respect to her involvement with the UDPS party relates to her former association. The First Respondent did not find that she was a current member of the UDPS party, which although complained about by the Applicant, was a finding which was open to the First Respondent to make in light of the production of an expired membership card. With respect to the Vice President position of the youth section of a particular region, which was accepted by the First Respondent, the Applicant herself demurred from the significance of this role in terms of general membership.

38. It is clear that the First Respondent considered whether there was a reasonable likelihood of the Applicant suffering persecution or serious harm in light of these accepted facts and the COI. Having considered that issue, the First Respondent, as already noted, determined that this was not established by the Applicant.
39. As this Court has stated on very many previous occasions, it is a matter for the First Respondent to consider and evaluate the evidence and determine what weight it attaches to it. This Court is concerned with the process of decision making rather than the decision made. It has not been established before this Court that any error arose in the decision-making process; that the First Respondent failed to consider a relevant piece of COI; or that the decision is irrational.
40. The reasons for the First Respondent decision in this regard are clear. Firstly, it determined that it did not accept as credible the Applicant's account of being a high-profile fighting activist of the UDPS who was being targeted by the ruling party because of her father's political position and her own political position. However, the First Respondent proceeded to determine, separate to that claim, that there were no other facts coupled with country of origin information which established a reasonable likelihood of persecution or serious harm for the Applicant. That this determination involved a consideration of the Applicant being a former member of the UDPS party (having regard to what membership entails, as already referred to), is clearly evidenced in the First Respondent's subsidiary protection considerations set out earlier.
41. It is also clear, from the terms of the decision, that the First Respondent considered the same accepted core facts in both the persecution and subsidiary protection analysis.
42. Accordingly, this ground of challenge is not made out.

Mental Health

43. Having already clearly come to the conclusion that it would be making a negative recommendation in relation to the Applicant's international protection claim, the First Respondent, perhaps foolishly in light of the purpose for the comment, made reference to having concerns about the Applicant's emotional well-being and mental health. This was clearly in light of the manner in which the Applicant had given her evidence, which appears to have been quite theatrical. The purpose of the First Respondent making these

comments was with respect to the Applicant's permission to remain review application which it anticipated would now follow in light of its negative recommendation.

44. No issue had been raised by any of the solicitors who have represented the Applicant at any stage during the international protection application process regarding her emotional well-being and mental health. Specifically, no issue was raised by her current solicitors, either prior to or post the hearing before the First Respondent. Accordingly, they clearly had no concerns arising from the oral hearing.
45. Counsel for the Applicant asserts that this view of the First Respondent vitiates the decision. It is submitted that the First Respondent should have adjourned the hearing once it formed this view and had the Applicant medically assessed. It is further submitted that the decision of the First Respondent has been made on the basis of evidence from the Applicant which the First Respondent had concerns about with respect to her mental health.
46. It is clear that the First Respondent did not have any concerns regarding the evidence which the Applicant gave with reference to her mental health. Indeed, it would appear that every opportunity was given to the Applicant to deliver her evidence in a comprehensive manner in light of her upset and emotional state, with the First Respondent adjourning at one stage when an occasion of the Applicant possibly fainting occurred. It is also clear that the First Respondent took a view regarding the engagement by the Applicant in giving evidence and was of the opinion that she appeared to be giving evidence from a pre-determined script. These are all matters which are completely within the First Respondent's remit to determine.
47. This matter was mentioned by the First Respondent for the attention of the Second Respondent who would most likely come to consider a review application of a refusal to grant permission to remain pursuant to s. 49(7) of the International Protection Act 2015. It is disappointing to see that a comment which can only have been meant in a caring and helpful manner, is now being utilised to attempt to vitiate the first respondent's decision.
48. No evidence has been placed before the Court to establish that there is any basis whatsoever regarding the ability of the Applicant to give evidence because of her emotional well-being and/or mental health.
49. No onus arose on the First Respondent to make any enquiries in this regard and no illegality arises.
50. Accordingly, the grounds of challenge to the First Respondent's decision have not been made out. I therefore will refuse the relief sought and will make an order for the Respondent's costs as against the Applicant.