

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1313 J.R.]

BETWEEN

M.M.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 10th day of March 2015

1. This is a telescoped hearing wherein the applicant seeks judicial review by way of order of *certiorari* quashing the decision of the Refugee Appeals Tribunal dated 24th August 2010 and which was notified to the applicant by letter dated 21st September 2010.

Background

2. The applicant is an Egyptian national born in 1960. He received primary, high school and university education and ultimately qualified as an accountant. Post qualification he worked in Saudi Arabia for 18 years followed by one year's unemployment in Egypt after which he emigrated to Kuwait in 1991 where he remained until late 2008. The applicant was married but is a widower since 1995. He has five children. The applicant was raised a Sunni Muslim but maintains that he converted to Shia Islam around the end of 2004 while working in Kuwait. In August 2008, he claimed to have been interrogated by the Kuwaiti authorities about his conversion to Shia'ism. He claimed that this interrogation was carried out at the behest of the Egyptian authorities who wished to find out which of their nationals had converted to that branch of Islam. He said he was asked to become a spy on his fellow Egyptian Shia but that he refused to do so. The applicant claims to have returned to Egypt in or about November 2008 to visit his family. He stayed in Egypt for approximately one month and returned to Kuwait in December 2008. He claims to have been detained by the security services at Kuwait Airport and while detained there claimed to have been insulted and ill treated. He was deported back to Egypt in December 2008. The applicant's claim is that he was then detained and abused (including alleged sexual abuse) by the Egyptian authorities in a series of detentions and claimed to have been detained four times in total. The applicant claims that apart from fearing persecution at the hands of the Egyptian authorities, he also fears persecution at the hands of Sunni Islam extremists in Egypt. He claimed that in August 2009, a member of one of those groups threatened to kill him because he was a Shia Muslim and claims that the individual who issued the threat would have known his religious affiliation from information obtained from the intelligence services.

3. The applicant applied for a visa to enter a number of countries. Ultimately his visa application to enter Ireland was successful and he arrived in the State on the 20th October 2009. He then applied for asylum on the 3rd November 2009. The applicant's claim for refugee status was that he feared persecution at the hands of both the Egyptian and Sunni extremists in Egypt on grounds of religion and that he would be persecuted as a failed asylum seeker if he were to return or be returned to Egypt.

Procedural History

4. An ASY 1 form was completed on the 3rd November 2009 and the Questionnaire was completed on the 12th November 2009. The s. 11 interview took place on 26 November 2009. In a report dated 5th January 2010, the Refugee Applications Commissioner refused his application for asylum and the applicant appealed this decision to the Refugee Appeals Tribunal on the 10th February 2010. An oral hearing took place on 3rd August 2010.

On 30th July 2010, in advance of the oral hearing the applicant's solicitor submitted a SPIRASI report dated 2nd July 2010 compiled by Dr. Ciaran Leonard who examined the applicant on 21st May 2010. The report, which ran to some twelve pages, outlined in detail an account given by the applicant of the claimed circumstances in Kuwait and Egypt which led to his asylum application in Ireland, in particular the alleged ill-treatment by the Egyptian authorities while the applicant was detained. The examining physician reports, inter alia, as follows:-

"He said that from [1]Airport he was taken by Al-Geeza Security to a building in [1]City. He said that there followed ten days of imprisonment, interrogations and abuse. He alleged that he suffered the following list of abuses:

- i. That he was placed in solitary confinement in a small cell measuring about 8 by 6 feet. He said that this cell contained no bed and no toilet facilities. He said there was no window but there was a small light. He said that in this cell he was fed once a day on bread and old cheese. He said he received a cup of water twice a day in a dirty mug.*
- ii. That was taken out of his cell on a daily basis for aggressive interrogations. He said that these interrogations included being spat at by the guards, being kicked and punched and occasionally hit by a stick and a flexible hose. He said the interrogations comprised three soldiers and one officer.*
- iii. That on a few occasions cold water was thrown over him during the interrogations.*
- iv. That they identified the surgical scar on his lower back and they targeted this for kicking and striking.*
- v. That he was placed spread eagled against the wall as he was lashed from behind*
- vi. That on one occasion three of the guards tried to sexually molest him. When he fought back they did not persist. He said that he was under the impression that if he had not resisted he would have suffered sodomy from them.*
- vii. That on more than one occasion a guard manually squeezed his penis to the point of ejection of blood He said*

that he had never mentioned this abuse to anybody else before this interview.

At this stage of the interview [the applicant] became very upset [The applicant] said that upon his release from detention he had a problem with urination for some time including blood in the urine and difficulty at micturition. "

5. The report also documents that during a subsequent period of detention the applicant "had his right hand broken by a baton".

6. The documented physical findings were, inter alia, :-

"[The applicant] presented as a large framed man who appeared to have lost a lot of weight around his trunk He was profoundly sweating on arrival into the assessment room ...His abdomen was soft but showed signs of superficial skin damage extending downwards from both costal margins.

Clinical inspection did not confirm whether these minor skin changes were evidence of scarring caused by the alleged abuses or whether they were caused by the severe weight loss ...Cursory examination of the genitals did not reveal any defect.

Examination of the musculoskeletal system revealed that the lumbosacral scar which was about 1.5 inches long (4cm) extending vertically down near the sacrum. Inspection of the skin in this area did not reveal any evidence that the sexual abuse he alleged had caused any skin damage. Lumbar flexion was extremely limited Straight leg raising on the right side was also limited to 75%. ... An examination of the right hand showed a minor deformity below his little finger, where he alleged the prison guard broke his hand He showed me an x-ray of this hand and it did confirm the presence of a healing fracture. The fracture in question concerned the basal one third of the fifth metacarpal bone.

Examination of the knees revealed marked crepitus on the right side. There was also a 2cm wide scar on the medial aspect of the right tibia. [The applicant] said that this was caused by one of the kicks he received He also pointed to other areas of his left knee which were also struck however the appearance of the skin neither confirmed nor refuted the story. "

7. The "Summary of Physical Examination" noted:-

"The overall impression of the physical examination was highly consistent with the story told [The applicant] did not describe any full penetration injuries of the skin to yield classical scars, bruising that he said he had would be expected to be well healed by now. Penile examination at primary care level could not be expected to reveal more than was noted above. If systems were to persist he would need the attention of the genital urinary specialist. "

8. Under the heading "Mental State Examination" the report noted, inter alia, that during the interview "[the applicant] got extremely tearful when discussing his genital abuse". The physician recorded the applicant as stating that "in respect of his genital abuse that this was an extremely private area and up to now had been extremely reluctant to let anyone know about it. He said that this was an area of great sensitivity in his culture".

9. The "Summary of Mental State Assessment" noted, inter alia that, :-

"[the applicant] revealed symptoms of anxiety, depression and post traumatic stress disorder. "

It was noted that the PTSD symptoms included "a tendency to avoid talking about these issues. [The applicant] had to be coaxed extremely to describe the actual events of abuse as noted above. Having described the events of the first arrest he would only expand on subsequent abuses where difference occurred. He became visibly upset when recounting the alleged abuses and said he tries to avoid discussing these or even remembering them."

10. Under "Conclusion" the report set out the following summary:-

"[The applicant] is a 49% year old Egyptian citizen who applied for asylum in Ireland on 12th November 2009. His grounds for this application were that he was being persecuted by the Egyptian authorities for converting from Sunni interpretation of Islam to the Shia interpretation. He made it clear that the government were more interested in the connections to Lebanon and Iran than his change of faith had created rather than his actual feelings about the prophet. He alleged ill treatment under the care of the Egyptian authorities of such severity that it satisfies the definition of torture given in the Istanbul Protocol ..."

11. Under the heading "Opinion" the report states:-

"The physical examination in my opinion was highly consistent with the story given. Most relevant was the huge difference between the obese man pictured in the mobile phone photo and the current picture. The most dramatic alleged abuse was the penile abuse. Primary level examination could not be expected to confirm or refute the history, and that if analysis of the urethra health had required a referral to a Genitourinary specialist would be necessary. The complaint of slowness of micturition is extremely common in men as they age, and is more likely due to prostrate hypertrophy than penile injury...

The scars and the right hand fracture were not dramatic but support rather than challenge the credibility. The non specific musculoskeletal findings are consistent with the story given. "

"The mental health examination was highly consistent with the story given. The BAI and BDI scores were both very high. [The applicant] gave a portrayal of a previous privileged and comfortable lifestyle which led to physical obesity and an overly secure mindset that was severely disrupted It is my opinion that the claimed auditory and visual perceptual disturbances were congruent to the story rather than suggestive of a psychotic process. (The applicant] showed a marked anxiety to be believed and therefore leading questions were very unreliable in his case.

My clinical diagnosis was that of atypical post traumatic stress disorder, as this diagnosis incorporates mixed mood state as well as the itemised items of PTSD listed above. "

Reference was made in the report to the Istanbul Protocol:

"Please note the terminology and hierarchy of terms used in this report is in accordance with paragraph 187 section d of the Istanbul Protocol".

Paragraph 187 provides:-

"The following discussion is not meant to be an exhaustive discussion of all forms of torture, but it is intended to describe in more detail the medical aspects of many of the more common forms of torture. For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:

(a) Not consistent: the lesion could not have been caused by the trauma described;

(b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;

(c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;

(d) Typical of this is an appearance that is usually found with this type of trauma, but there are other possible causes;

(e) Diagnostic of this appearance could not have been caused in any way other than that described "

The Protocol goes on to state:-

"Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story..."

The Tribunal's decision

12. The Tribunal made a number of adverse credibility findings on the applicant's case. With respect to the applicant's claim to have been sexually assaulted, the Tribunal Member stated: *"This man made an application for asylum in this country on the 3rd day on November 2009. He completed a questionnaire on the 12th day of November 2009. A questionnaire is a document that he completed by the applicant himself, or else with the assistance of a third party. There is no interview process involved in the completion of the questionnaire. At question 21 of the questionnaire he was asked the following question "why did you leave your country of origin". The applicant gave a long and detailed answer to that question which ran to approximately five pages. Inter alia, it contained details as to the alleged ill treatment that this man suffered while he was in custody. As an example of that, I wish to quote as follows:*

"There also I was cursed and beaten more than in []. They humiliated me, spit on my face, kick me strongly all over my body and I was imprisoned for ten days". He also made the following reference to ill treatment in custody at page 23 of his questionnaire as follows " I was severely insulted by curses and bad words, in addition to beating me and treating me very badly like they treat criminals. "

[The applicant] was interview pursuant to Section 11 of the Refugee Act 1996 on the 26th day of November 2009. He did not make any reference at the questionnaire stage to any sexual assault. Also, he did not make any reference at the interview stage to any assault of a sexual nature. At oral hearing he stated that he was too embarrassed to make any reference to a sexual assault at the interview stage because the interview was conducted in the same manner as any normal interview. However, I cannot see any reason why [the applicant] would not make any reference to the sexual assault at the questionnaire stage. The questionnaire stage contains extensive information and background on [the applicant's] alleged treatment in Egypt. He makes reference to a number of physical assaults at the questionnaire stage. However, an assault of a sexual nature is, obviously, a much more serious allegation. Within the realms of the criminal law, sexual assault carries a much graver penalty than an ordinary common assault or even an assault occasioning harm. [The applicant] would not have been prejudiced in any way by making reference to the sexual element to his claim if, in fact, he had been sexually assaulted when he was detained by members of the security forces in Egypt. The absence of any reference to the sexual assault prior to the oral hearing on the 3rd day of August 2010 must question the credibility of this man's appeal in so far any alleged ill treatment in Egypt is concerned This is a significant item of credibility because the central element to his appeal relates to his, alleged, ill treatment while he was detained by members of the security forces in Egypt. "

The Tribunal also took the view that there were discrepancies in the accounts given by the applicant concerning the various periods of detention by the Egyptian authorities. It held that the discrepancy concerning the periods of detention between the Questionnaire, the interview and the Tribunal hearing was significant and cast doubt on the credibility of that aspect of the applicant's claim. It formed the view that this was not a minor item of credibility because the appeal centred on the applicant's alleged periods of detention and the treatment afforded to him while detained.

The Tribunal also found aspects of the applicant's reasons for his claimed detention not to be credible. It found that at initial stages of his asylum application, the applicant stated that the reasons he was detained by both the Kuwaiti and Egyptian authorities was because of his conversion from Sunni to Shia Islam. At the oral hearing before the Tribunal the applicant stated that his detentions also arose because his interrogators in Kuwait believed him to have some connection to either Iran or Lebanon and that while detained with the Egyptian authorities that he had some connection with Hezbollah. The Tribunal found it significant that at the earlier stage of the asylum process, the applicant had not made specific reference to the political element of his claim. For that reason the Tribunal felt entitled to take that factor into account in assessing the overall credibility of his claim but the Tribunal accepted that his claims of arrest during 2009 coincided with the activities of Islamic groups within Egypt. The Tribunal found it unlikely that if the authorities in Egypt were alleging that he had connections, either political or otherwise, with either Lebanon or Iran then it was felt unlikely that the applicant would have been released after a relatively short period of detention.

The Tribunal then engaged in an overview of the status of Shia in Egypt. It considered it significant that the Shia did not appear to suffer from the same discrimination as non Muslim religious groups.

It then turned to a SPIRASI report and noted that the examining physician had been dependent on the applicant for the information which led to the various conclusions in the report. Accordingly, the Tribunal found it difficult to conclude that the findings in the report were related to ill treatment at the hands of the authorities in Egypt. The Tribunal also noted that it had been furnished with a

certificate from a hospital in Egypt together with copy of the result of an x-ray in connection with the applicant's claim that his right hand had been broken in detention. The Tribunal noted that the certificate, while confirming that the applicant had broken his right hand, did not provide any information as to how this had occurred.

With regard to two previous Tribunal decisions which had been submitted in connection with the applicant's appeal, the Tribunal concluded that neither was relevant to the appeal.

The Tribunal noted that while the applicant claimed to have been threatened by an extremist group in Egypt, he did not appear to have come to any harm at the hands of any extremist group while living in Egypt. With regard to the applicant's claim that his son had been attacked by one of those extremist groups and the photographs furnished by the applicant in respect thereof, the Tribunal stated that it was dependent on the applicant's oral testimony as to the fact that the pictures were of his son and secondly that his son had suffered injuries at the hands of some extremist group in Egypt.

Taking all of the circumstances into account, the Tribunal was not satisfied that the applicant was a refugee and it affirmed the recommendation of the Commissioner.

The Tribunal's consideration of the SPIRASI report

13. In part 4 of the Decision, the Tribunal noted the submission made on the applicant's behalf that "[h]e did not mention the sexual abuse at the earlier stage of [the asylum] procedure because mentioning such sexual matters would be contrary to his religious beliefs" and that "it should be accepted that he was too embarrassed to mention the sexual assaults at an earlier stage."

In the s. 6 analysis, the Tribunal Member had this to say:-

"In essence, the central aspect of this appeal relates to [the applicant's] alleged ill treatment in custody. It was claimed that he was detained on a number of different occasions. He has stated that the most serious physical injury that he suffered was a broken hand and a medical report, together with an x-ray has been submitted in support of that physical injury.

At oral hearing on the 3rd day of August 2010, [the applicant] made reference to an assault of a sexual nature. He also made reference to a sexual assault when he was examined by a Dr. Ciaran Leonard on the 2nd day of July 2010. That examination led to the issue of the SPIRASI report which was handed into the Tribunal on the 3rd day of August 2010."

14. At p. 19 of the decision, the Tribunal Member again addresses the SPIRASI report:-

"I have been furnished with the SPIRASI report from Dr Ciaran Leonard which is dated the 2nd day of July 2010. I note that Dr Leonard had been furnished with the following documents prior to the preparation of the SPIRASI report.

- 1. Application of refugee status questionnaire of the applicant dated the 12th day of November 2009*
- 2. Section 11 interview*
- 3. Section 13 report.*

Dr Leonard would have been dependent on [the applicant] for background information which led to the various conclusions in his report.

I have outlined, in the foregoing paragraphs, my views on the various claims that had been made by [the applicant]. Claims of this nature must be assessed 'in the round' and while Dr Leonard has proffered his views on [the applicant's] physical and mental situation, I find it difficult to conclude those findings are related to ill treatment at the hands of the authorities in Egypt. Again, it is important to reiterate that Dr Leonard was, totally, dependent on statements made by [the applicant] to ground his various conclusions. "

The grounds of challenge

15. The applicant's statement of grounds contained eleven challenges to the Tribunal's decision. In the course of written and oral submissions the challenge was distilled to two specific grounds:

i. The Tribunal failed to conduct a rational analysis of the medical and psychological evidence which supported the applicant's claim and failed to explain on the basis of cogent and adequate reasons why, in the light of that medical and psychological evidence, the applicant's credibility was not accepted or why the medical evidence was rejected. It is submitted that the Tribunal Member erred in law in rejecting the report as not independent and erred in law and fact in failing to regard the report as independent evidence of torture.

ii. When holding against the applicant's credibility the fact that the applicant had not disclosed his sexual abusive in his Questionnaire or during his s.11 interview, the Tribunal failed to take into account the expert evidence contained in the SPIRASI report dated 2nd July 2010 which demonstrated the following:

- During the SPIRASI interview the applicant became extremely tearful when discussing his genital abuse.
- The genital abuse is an area of great sensitivity in the applicant's culture and up to meeting with the SPIRASI physician the applicant had been extremely reluctant to let anyone know about it.
- Post traumatic stress disorder specific symptoms experienced by the applicant include a tendency to avoid discussing abuse or even remembering it.

Counsel for the applicant drew the court's attention to the Tribunal Member's twice use of the word "dependent" in his analysis of the SPIRASI report and it is submitted that the Tribunal Member erred in law in rejecting the report as not independent and erred in law and fact in failing to recognise the report as independent evidence of torture. In this regard the applicant relied on the dictum of the English Court of Appeal in *R. (AM) (Angola) v. Secretary of State for the Home Department* [2012] EWCA Civ 521 where that court

had to consider whether two reports from the Helen Bamber Foundation (a human rights charity that provides medical/legal reports in a manner similar to SPIRASI) concerning the appellant's mental health and scarring constituted independent evidence of torture. In that case Rix L.J., writing for the court, stated:-

"In my judgment, Ms Kralj's reports constituted independent evidence of torture. Ms Kralj was an independent expert. She was expressing her own independent views....."

If an independent expert's findings, expert opinion, and honest belief (no one suggested that her belief was other than honest) are to be refuted the status of independent evidence because, as must inevitably happen, to some extent the expert starts with an account from her client and patient, then practically all meaning would be taken from the clearly important policy that, in the absence of very exceptional circumstances suggesting otherwise, independent evidence of torture makes the victim unsuitable for detention. That conclusion is a fortiori where the independent expert is applying the internationally recognised Istanbul Protocol designed for the reporting on and assessment of signs of torture. A requirement of "evidence" is not the same as a requirement of proof conclusive or otherwise. Whether evidence amounts to proof on any particular standard (and the burden and standard of proof in asylum cases are not high), is a matter of weight and assessment.

The only reason ultimately given by the judge for not accepting Ms Kralj's reports as independent evidence of torture is contained in the last sentence of his para 24, where he said: "But the report did not provide independent evidence that the claimant had been tortured because that depended upon accepting the claimant's account how they were caused" (emphasis added). If the judge was talking about Ms Kralj's belief that was plainly independent evidence, even if it depended in part on formulating her opinion in the light of AM's account. If, however, the judge was referring to the "acceptance" by the Secretary of State, that is neither a matter of evidence, nor is it independent.."

16. It is submitted, essentially, that the Tribunal Member fell into the error highlighted in the above case, in finding Dr. Leonard's report not to be independent evidence.

17. The respondents contend that the applicant's reliance on *R. (AM) (Angola) v. Home Secretary* is misplaced as that case does no more than reiterate that the reports from the Helen Bamber Foundation constituted independent evidence of torture, when it pointed out that the examining physician in that case was an independent expert expressing her independent views and that it was for the Home Secretary to weigh the report. The Court of Appeal simply rejected the Home Secretary's position that the report's independence was undermined by the lack of credibility in the applicant's narrative. The respondents do not take issue with the rationale in the said judgment and submit that in the instant case the Tribunal Member did not reject the SPIRASI report on the basis that it was not an independent report, rather it weighed the report, taking into account that the examining doctor was dependent on the applicant for the account given as to past persecution in Egypt.

18. The respondents also argue that unless a SPIRASI report attaches thereto the highest standard set out in the Istanbul Protocol (which was not the case here), while it may be an independent report, it is nevertheless not proof, a point, the respondents say, which is encompassed in the English Court of Appeal decision of *R (EO) v. Secretary of State for the Home Department* [2013] EWHC 1236 where that court, with reference to the decision in *R (AM) v. Secretary of State for the Home Department* (already referred to above) stated:-

"The court contrasted 'independent evidence of torture' with proof that there had been torture. The same distinction is drawn in the Secretary of State's policy documents. There is a clear difference between something that amounts to independent evidence of a fact and proof of that fact. In making any finding of fact, the fact-finder will weigh all of the evidence according to different weight to different pieces. The credibility of a witness will be critical in determining the answer to any factual question; and when a witness is making a claim his credibility will be crucial. But that does not mean that a piece of evidence which supports his central claim is any less 'independent evidence' even if, in the end, the claim is rejected. The underlying credibility of a detainee does not, in my judgment, go to the question whether something amounts to independent evidence of torture. Such evidence is necessarily something beyond the say so of the person concerned. "

This approach, it is claimed, is no different to the approach adopted by the Irish Courts, where SPIRASI reports are viewed as evidence from an independent body. Their independent character is entirely separate to the credibility of the applicant. The SPIRASI report feeds into the issue of credibility and it is for the Tribunal to weigh and assess credibility and weigh the SPIRASI report in the balance.

Overall, I am not persuaded by the applicant's argument that the Tribunal Member's reference to Dr. Leonard being "*dependent on*" the account given by the applicant to ground the conclusions in the SPIRASI report constituted a rejection by the Tribunal of the independence of the report.

The Tribunal Member did not say that the report was not independent evidence. Accordingly, the applicant's argument on this issue is rejected.

19. The question for determination is whether the report's findings merited a more expansive examination by the Tribunal Member as part of his assessment "*in the round*" of the applicant's credibility. The applicant contends that had the Tribunal Member properly considered the SPIRASI report, it could have tipped the balance in favour of the applicant's account as, it is argued, the credibility findings were not of such force as entitled the Tribunal Member to trivialise the SPIRASI report as dependent on the applicant's account.

20. The manner in which medical evidence should be considered was addressed in *Khazadi v. Minister for Justice Equality and Law Reform* (Unreported, High Court, 19th April 2007) where Gilligan J. stated:-

"Now, I take the view in the circumstances that arise that the Tribunal Member is considering any assessment of the applicant's credibility was required to consider, as part of his deliberations, the medical evidence in total that was before him and was obliged as part of a rational analysis to explain having considered the medical evidence along with the other evidence that was before him why in the view of the Tribunal Member the applicant was not telling the truth and his credibility was undermined. "

"My overall conclusion is that the medical evidence that was before the Tribunal Member should have been considered, weighed in the balance and a rational explanation given as to why it was being rejected in circumstances where the

Tribunal Member was making a finding that the applicant was not credible. Where had he conducted his reference to the medical evidence at the right forensic time it is, at least possible that he would have come to a different conclusion. "

21. This approach was also adopted by Clark J. in *R.M.K. v. Refugee Appeals Tribunal* [2010] IEHC 367 where she stated:-

"The appropriate manner of assessment is to consider all facets of the evidence in context and not to come to any conclusion until all available evidence is reviewed. Where an applicant provides a story which might be true and the medical evidence tends to confirm his story then it is axiomatic that an overall assessment of the evidence should weigh in his favour. The difficulty however is when, notwithstanding very compelling and supportive medical reports which outline objective findings, the applicant's narrative is not found credible and is not supported by reliable COI. "

"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 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 report on objective findings and use 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.... "

In *P.E. V. Refugee Appeals Tribunal* [2013] IEHC 253 Clark J. was satisfied to quash a decision on the basis that the Tribunal did not deal adequately with a SPIRASI report. The learned judge stated:-

"Dr Bastible of the SPIRASI organisation is a specialist physician experienced in examining persons who claim torture injuries. She records in her report that the applicant was tearful at various points when providing her history. On physical examination she found scars on the applicant's forehead and nose which were "highly consistent" with cigarette burns; scars on her ankles, knees, thigh and shin which "could be consistent" with the trauma she alleged she received from her captors; a scar on her lower back which was "consistent" with a blunt injury such as a baton mark as she alleged; scars on her arms, elbow and wrist which were "unusual in their distribution and suggest multiple trauma from a person or persons unknown"; scars on her shoulder which were "again consistent with baton marks" and scars on her abdomen and feet which were "highly consistent with baton marks from the soldiers". The other findings related to her opinion of the applicant's mental health, which to a considerable extent derived from what she reported to the doctor. "

She went on to state:-

"It appears to the Court that the Tribunal Member disregarded the corroborative potential of the medical evidence too readily simply because he had made credibility findings based mainly on discrepancies in the applicant's evidence rather than putting the medical reports, especially the SPIRASI report, into the totality of the evidence to be assessed. The medical reports had not before the Commissioner and were capable of making a difference to the Tribunal assessment of credibility and of causing a fair minded assessor to pause and ask how else a young Hutu girl from Rwanda with her accepted history could have such a wide distribution of marks and scars, if not from the type of maltreatment described. The inconsistencies in her evidence were minor and some findings were made in error and must surely have been counterbalanced by the medical reports on the applicant's emotional state and the multiple scars on her body. For this reason alone the decision cannot stand. "

Counsel for the respondent relies on the dictum of the English Court of Appeal in *R. (H.S. Uganda) v. Secretary of State for the Home Department* [2012] EWCA 94 as authority for the proposition that the weight to be given to a SPIRASI report depends on the credibility of the applicant. That court stated:-

"The judge was finding, as it seems to me, that while Dr Bird had done all that he could reasonably do in the circumstances the very nature of the exercise could not bring credibility to the appellant's account when none otherwise existed. It was for this reason that the judge concluded that Dr Bird's evidence left untouched Immigration Judge Gordon's analysis of the appellant's claim to have been detained for his political beliefs. In my judgment, this was a conclusion which was open to the judge on the evidence. This was not, as the judge said, a case in which the medical evidence reopened to any significant extent the conclusions which the immigration judge had reached upon the appellant's underlying account. Even if the appellant had been injured deliberately in one or more of the particulars he alleged, he had not been injured as a result of detention based upon his membership of an opposition party in Uganda. For that reason, the appellant had failed to establish to the lower standard of proof a well-founded fear of persecution for his political beliefs."

22. The court was also referred to body of case law in this jurisdiction where decisions of the Refugee Appeals Tribunal have been upheld despite the decision maker not having engaged with medical evidence or where such evidence was found to have no probative value. The respondents place particular reliance on the dictum of Clark J. in *N.R.M v. Refugee Appeals Tribunal* [2014] IEHC 120:-

"24 ...the primary argument related to the treatment of the SPIRASI report and it was accepted that many of the credibility findings made in the decision under challenge were open to the Tribunal Member. The central submission made on her behalf was that given the applicant's narrative of unlawful arrest, detention, torture and rape, the Tribunal Member's treatment of the SPIRASI report was totally inadequate....."

The Tribunal Member considered the medical report at the commencement of his assessment and noted the relevant finding. He then went on to consider the applicant's statements and documents and concluded that relevant aspects of the applicant's story were implausible and inconsistent. In such circumstances it would require a medical report containing very compelling objective findings to require a fair minded assessor to pause or reconsider the plausibility of the applicant's story. The reality is that apart from the scarring which is not related to the applicant's alleged flight, no objective findings were made in the SPIRASI report apart from the doctor's opinion that she suffered PTSD and a depressive disorder. No evidence was produced to support the applicant's claim of being struck by hand guns by two soldiers until she lost consciousness nor was there any suggestion of scarring or marking consistent with alleged regular kicking by soldiers when she was in detention in 2008....."

It is difficult to understand what more a Tribunal Member is supposed to do with a subjective medical report (which is highly dependent on the narrative of an applicant who knows that her asylum claim has failed at first instance) other

than note its content especially when as occurred here, the balance of the evidence is overwhelmingly in favour of a finding of a lack of credibility particularly in light of the contents of two manifestly dishonest letters purporting to come from the MLC. It is almost absurd to suggest that the Tribunal Member's findings should be invalidated simply because the applicant's self reporting of events to SPIRASI was consistent with her account to the Commissioner and the Tribunal. This is especially so in this case where it was quite reasonably doubted that those events of 2008 had ever occurred and on which further doubt has arisen following recent revelations of her travel to the UK and her inability to prove that she ever returned to the DRC. "

23. The respondents argue that, on the authority of *N.R.M*, it was entirely permissible for the Tribunal Member in the instant case to weigh the SPIRASI report by reference to the doctor being dependent on the applicant. They submit that the Tribunal Member, as the trier of fact, weighed the evidence and that the conclusion arrived at was open to him on the evidence. It is argued that this is not a case where the Tribunal Member ignored the medical evidence.

24. In *M.E. v Refugee Appeals Tribunal* [2008] IEHC 192, Birmingham J. refused leave to challenge the basis upon which a medical report being dealt with by the Tribunal stating:-

"The medical report spoke of the injuries as being "consistent with" a beating with a light rod or stick. If one follows the approach of the Istanbul Protocol, this would mean that while the injuries were "consistent with" such a beating, there are also many other possible causes...Even if one accepted that the injuries were caused by the method described (i.e. a beating with a light rod or stick), the report offers no assistance as to where, when and in what circumstances the injury was caused. The report is indicating that it was possible that the injuries were caused as described but does not elevate that to a probability. "

He continued:-

*The non specific nature of the medical evidence in this case may be contrasted with the situation in *Simo v The Minister for Justice, Equality and Law Reform & Anor* [2007] IEHC 305, where the applicant was claiming to have been subject to 'Falanga' on a daily basis, during which the soles of his feet were whipped. Country of Origin information indicated that this practice did indeed occur in Cameroon, and the medical report from SPIRASI recorded injuries to his feet as being 'highly consistent' with the applicant's account. Other injuries, too, were regarded as consistent with, and in some cases highly consistent, with various other forms of abuse described. "*

25. In *Vignon v. Refugee Appeals Tribunal* [Unreported, High Court, 21st January 2009], Birmingham J., observed that:-

"[t]he most that any physical examination can do is to record what was observable and comment on whether their physical signs are consistent with the account put forward. As we know, in commenting on the significance of medical evidence, a practice is do so by reference a scale that is set out in the Istanbul Protocol.

However, what a medical report cannot do is offer any assistance as to the circumstances in which the applicant has come by his injuries. So, marks on the feet can be consistent with cigarette burns, but there is no assistance to be obtained as to whether those burns were inflicted in prison during the course of torture or whether they were caused to be inflicted for the purpose of bolstering the applicant's account. The Tribunal Member clearly believes in this case, that it was just that which has happened As the person who has observed the applicant give his evidence, he was best placed to meet the assessment and accordingly I do not believe that the applicant's challenge on this ground is made out.."

26. An issue for consideration in *Pamba v. Refugee Appeals Tribunal & Ors* (Unreported, High Court, 19th May 2009) was whether the applicant's right to fair procedures and natural and constitutional justice was breached by the manner in which the Tribunal dealt with psychological findings in a SPIRASI report. In that case, Cooke J. noted the Tribunal's rejection of the applicant's explanation that she had been too embarrassed to allude, in her questionnaire, to her claim to having been raped or sexually molested.

In assessing whether the Tribunal's approach was lawful, Cooke J. had regard to the contents of the Spirasi report and went on to state:-

"As previously indicated, the issue raised in the single ground on which this claim for relief is based is whether in those circumstances, and given that there could be no doubt as to the reasons why the Tribunal rejected the appeal, there was nevertheless an unlawful failure by the Tribunal member to state or to state adequately in the decision the reason why that Spirasi report did not alter the view which the Tribunal Member clearly took of the credibility, or rather lack of credibility, in the applicant's account of the events which allegedly caused her flight from Uganda. "

In response to arguments made by counsel for the applicant the judge had this to say:-

"Counsel for the applicant places emphasis on the fact that the assessment of the applicant in the report should have been considered and, if necessary, explained away as being incompatible with the weight placed in the contested decision on the demeanour of the applicant, her evasiveness, failures of recollection, and even petulance. In other words, it is argued that the decision should explain why the condition of anxiety and post traumatic stress did not account for the criticised quality of her evidence. The Court cannot agree. While the report describes her as being depressed, anxious, and sometimes distressed by her recollections, it does not in any way suggest that she had or would have had difficulty in explaining herself it says, "She was orientated and conscious at all times. There was no evidence of formal thought disorder. She was very sad and depressed but nevertheless able to engage in the interview process and establish some rapport...."

The Court considers that there is no specific or concrete finding, assertion or opinion in that report which would run so counter to the Tribunal member's primary assessment of the applicant's personal credibility as to require distinct explanation or statement of reasons. The Tribunal member does not in that sense reject the Spirasi report as is suggested in the ground advanced, he simply considers that it does not weigh sufficiently in the balance to upset the appraisal of the fundamental lack of credibility in the applicant's own direct testimony. "

Cooke J. also stated:-

"...there is no necessary connection between the applicant's condition as presented to the medical expert and the events in her claim. The expert confirms that she is anxious, distressed, terrified of returning to Uganda and suffering

from post-traumatic stress disorder, but the opinion is not so obviously or necessarily incompatible with the appraisal of credibility made by the Tribunal member as to require a distinct statement of reasons as to why it did not operate to change the Tribunal member's mind."

27. In *O.B. Refugee Appeals Tribunal* [2011] IEHC 363, Hogan J., in considering a SPIRASI report which found that an applicant's emotional symptoms were highly consistent with her claims of violence and rape, stated:-

"As Gilligan J pointed out in Khazadi v. Minister for Justice, Equality and Law Reform, High Court, 19th April, 2007, it was nonetheless necessary for the Tribunal to have:-

"considered [and] weighed [the medical evidence] in the balance and a rational explanation given as to why the Tribunal member was making a finding that the applicant was not credible."

In the present case, I consider that the Tribunal member satisfied this test. Having weighed the evidence he concluded the Spirasi report did not fundamentally assist the applicant since it did not tend to show that the perpetrators of the rape were police agents. This must also be understood against a background where the Tribunal member had earlier rejected a key and integral factual aspect of her account, namely, that she was apprehended by such agents after speaking at the public demonstration the day before and that the rape took place while in such custody. "

28. All of the above-quoted case law is instructive in that it would appear that the approach of the courts to the question of the discretion of decision makers as to how to deal with medical evidence will depend on the particular circumstances of each case. Some general principles emerge however; indeed many of them are set out in the judgment of Clark J. in *R.M.K. v. RAT*, already referred to. In summary, my understanding of what the jurisprudence establishes is as follows:

- In considering any assessment of an applicant's credibility, decision makers are obliged to consider the medical evidence in total before them;
- The medical evidence must be put into the totality of the evidence to be assessed and must not be tangential or peripheral to such assessment;
- It is always a matter for the decision maker to assess the probative value of the contents of such reports;
- Where an applicant provides a story which might be true and the medical evidence tends to confirm his or her story then it is axiomatic that an overall assessment of the evidence should weigh in the applicant's favour;
- If medical evidence is to be rejected, it is incumbent on the decision maker to give reasons;
- A summary consideration of medical evidence by a decision maker may be upheld where the medical evidence uses phrases of low probative value:
- Where an examining physician reports on objective findings and uses phrases which attach a higher probative value to those findings, the medical evidence should be treated as providing potentially objective corroboration of the claim;
- If such evidence is to be rejected, the reasons for rejecting the reports must be more fully addressed in the decision;
- The requirement to more fully address reasons for rejecting medical reports which attach a higher probative value to clinical findings may be less where the balance of the evidence is overwhelmingly in favour of a finding of a lack of credibility.

29. Counsel for the applicant submits that the present case is not one that falls within that category of cases where, as found in *M.E.*, the medical evidence carried so little weight that the Tribunal Member's summary consideration of the medical evidence was upheld. He points to Dr. Leonard's overall assessment that the applicant's physical and mental health examinations were "*highly consistent*" with the account given by the applicant.

30. The respondents submit that the SPIRASI report's "highly consistent" findings were based on very tenuous findings. They also argue that the approach of the Refugee Appeals Tribunal in attaching little or no probative value to "*highly consistent*" findings in medical reports has been upheld by the High Court. Moreover, the respondents submit that it was the Tribunal's belief that in raising, at the appeal stage, the claim to having been sexually abused, the applicant was buttressing his claim. With regard to this particular submission, I note that the Tribunal did not make such a finding.

31. Other than noting the examining physician's dependence on the applicant for information and that "*Dr. Leonard has proffered his views on [the applicant's] physical and mental situation*", the Tribunal Member did not engage in any substantive manner with the contents of the report. It is noteworthy that none of the medical findings is recited in the Decision. The Tribunal Member restricts his assessment to noting the physician's dependency on the applicant to ground his various conclusions. It is clear that the report's findings did not weigh with the decision maker in any regard to counter the negative credibility findings set out in the Decision. These credibility findings are not the subject of challenge in these proceedings but, importantly, it is argued that the contents of the Spirasi report were wholly unconsidered in the context of the finding concerning the applicant's failure to disclose either in his Questionnaire or at interview his claim to have been sexually assaulted while detained. The salient features of the medical report are the physical and mental state examination clinical findings were "*highly consistent*" with the account given by the applicant. These findings, which were independent of the applicant, were capable of providing potential objective confirmation of his account. Of course, I emphasise that the weight to be attached to them was a matter entirely for the Tribunal Member. The difficulty is that he appears not to have engaged with them in any substantive way. The respondents have argued that the applicant's case fell within that category of cases where, to quote Clark J. in *NR.M v. RAT* "*the balance of evidence is overwhelmingly in favour of a finding of a lack of credibility*". The respondents have not persuaded this court that that threshold has been met in this case. The findings on credibility were not of the magnitude to merit a departure from the principles set out in *Khazadi v. Min. for Justice* and *R.M.K v. RAT* and, to my mind, were not on par with the circumstances in *N.R.M v. RAT* or *O.B. v RAT* or *Pamba* in respect of which the approach adopted to medical reports was upheld by the High Court. Furthermore, one of the main credibility findings in the present case centred on the applicant's failure to disclose, prior to the oral hearing, his claim to have been sexually assaulted. He gave an explanation to the Tribunal Member as to why he had not done so. In the totality of the case, I entirely accept that explanation was solely for the Tribunal Member to accept or reject. The difficulty however is that: the Tribunal Member appears to have assessed that explanation in isolation from the findings in the Spirasi report. The applicant's mental state assessment revealed, inter alia, symptoms of post traumatic stress disorder: one of

the elements of the applicant's PTSD, as diagnosed by Dr. Leonard, was a tendency to avoid talking about the alleged abuse. This particular element of the diagnosis had the potential to inform the Tribunal Member's thinking on the applicant's credibility, in view of the failure to disclose the alleged sexual abuse at an earlier stage in the process and, to my mind, and should have been weighed in the balance when assessing the applicant's explanation for the previous non disclosure. The weight to be attached to it was a matter for the Tribunal. However, there is no indication that this was done. If it was done and rejected, in all the circumstances, it was incumbent on the Tribunal Member to afford a more detailed consideration to the report and to provide cogent reasons for rejecting its probative value. While I have not accepted that the argument the Tribunal Member rejected the report as not being independent, its independent nature was nonetheless too readily disregarded: the report warranted more than a mere reference to Dr. Leonard having been dependent on the applicant to ground his conclusions. The Tribunal's failure in these regards leads inexorably to the conclusion that its decision is flawed to the extent that it cannot be allowed stand.

32. I am thus satisfied that the applicant has made out a substantial case which warrants the granting of leave. As this is a "telescoped" hearing, I formally grant leave and make an order quashing the Decision. The matter is remanded back to the first named respondent for reconsideration before a different Tribunal Member.