Neutral Citation Number: [2012] IEHC 499

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2011 / 631 J.R.

Between:/

N. N. [CAMEROON]

APPLICANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 28th day of November 2012.

1. The applicant, who has been refused a declaration of refugee status, seeks an order of certiorari quashing the decision of the respondent Minister dated 28th June 2011 that she is ineligible for subsidiary protection. Leave was granted by Cooke J. on 25th July 2011 to challenge the validity of the refusal on five grounds. The applicant also seeks leave to amend her statement of grounds to include one further challenge to the validity of the decision on the basis that she received an incomplete version of the Minister's decision refusing her subsidiary protection and was unaware of the additional defect until a full version was furnished on the day of the hearing. With one possible exception, the existing grounds on which the applicant seeks relief are procedural and unconnected to the facts of her case and were in July 2011 novel in their nature but have since then been considered and rejected.

2. The applicant who claims to come from Cameroon applied for asylum in February 2008. Both the Refugee Applications Commissioner and the Refugee Appeals Tribunal rejected her claim on credibility grounds but also expressed the view that if her claim were credible, internal relocation within Cameroon would be a viable option for her. The Tribunal decision was not challenged. In May 2009 the Minister informed her of his decision not to grant her refugee status. She then applied through her solicitors for subsidiary protection and humanitarian leave to remain, putting forward the same facts as had previously been found non-credible by the asylum authorities. By letter dated 30th June 2011 she was informed that her subsidiary protection application had been refused and soon afterwards she received a deportation order. These proceedings challenge the subsidiary protection decision.

Failure to Cooperate

3. The first three grounds on which leave was granted relate to the argument that the State has failed to properly transpose Article 4(1) of Council Directive 2004/83/EC commonly known as the Qualification Directive into Irish law. Since the substantive hearing in this case the Court of Justice of the EU has delivered judgment on this issue in the case of *M.M. v. Minister for Justice and Equality* (Case C-277/11) arising from a preliminary reference made by Hogan J. The CJEU has rejected the argument based on Article 4(1) of the Directive but has given guidance as to the manner in which the right to be heard in all proceedings, which is a fundamental principle of EU law, is to be applied where there are two separate procedures for assessing asylum and subsidiary protection decisions. The CJEU has essentially found that the fact that an applicant is duly heard during the asylum process does not mean the right to be heard can be dispensed with at the subsidiary protection stage. It found that the right to be heard means that an applicant Unusually equated by the CJEU with a defendant must be afforded a sufficient opportunity to put forward his views before an adverse decision is adopted. In the light of that guidance, the matter will now revert to Hogan J. for a determination as to whether in the case of Mr. M the procedures employed by the Minister when assessing subsidiary protection were compatible with the requirements of EU law Mr. M did not have an oral appeal before the Refugee Appeals Tribunal.

4. It seems to this Court that the *M.M.* judgment does not represent any great departure from the law as it stands. As a matter of basic principle, the right to be heard is not exclusive to EU law. The basic principle of *audi alteram partem* is a constituent element of our domestic constitutional regime (see e.g. *Re Haughey* [1971] I.R. 217) and the right to a fair hearing is one of the fundamental rights enjoyed under Article 6 of the European Convention on Human Rights. The rights described in the *M.M.* judgment were recognised by Cooke J. in *N.D. v. The Minister for Justice and Law Reform* [2012] IEHC 44, among others.

5. In this case, the applicant was legally represented by experienced solicitors when she made detailed written submissions to the Minister in support of her subsidiary protection application. She advanced exactly the same story which she had advanced at the earlier stage and made no submissions as to why the Minister should depart from findings already made about the credibility of her story. She did not challenge the credibility findings by way of judicial review and she did not seek an oral hearing or personal interview with the Minister. No attempt has been made to show how she would have benefited from any additional opportunity to present her views at the subsidiary protection stage. The Court cannot see how dialogue with the Minister through an interview or hearing or by way of additional correspondence or by being furnished with a draft decision could have benefited this particular applicant. An element of reality must enter into this assessment. The challenge which she has brought to the subsidiary protection decision is procedural in nature and it bears no relationship with the substance of the decision. In the circumstances the Court finds no reason to adjourn this aspect of the applicant's claim while awaiting the judgment of the Hogan J. in *M.M*. The applicant does not succeed on grounds 1, 2 and 3.

No Effective Remedy / Lack of Appeal Mechanism

6. The fourth ground on which leave was granted is that there is no effective remedy for a breach of the right to apply for subsidiary protection, in breach of the Constitution, Article 13 of the European Convention on Human Rights, or Article 47 of the *Charter of Fundamental Rights of the EU*. The fifth and final ground relates to the failure to provide an appeal mechanism for subsidiary protection decisions, in breach of the EU law principle of equivalence. Identical grounds have been considered and comprehensively rejected by a number of different judges in an ever-expanding series of cases including a recent judgment of this Court in *J.C.M. and*

M.L. (DR Congo) v. The Minister (Unreported, High Court, 12th October 2012). As in that case, the Court declines to grant relief on these grounds.

Error of Law as to the meaning of "Serious Harm"

7. When the applicant's case was first listed for hearing, the applicant's counsel Mr Paul O'Shea B.L. sought an adjournment on the basis that he had not received the entire decision or there was more than one decision in circulation or different versions of the decision were in being or his client never received a complete version or any version. Amid this confusion the hearing was adjourned to 29th June 2012 and the respondents were directed to respond to the claims made. The Court is satisfied with the explanations given by the respondents and considers that the applicant herself may have provided her current solicitors with the version of the decision where two pages were missing. The Court is satisfied that the applicant's former solicitors, the Refugee Legal Service, received a full copy of the decision and that any variations in the appearance of the various versions of the decision derive from a non-paginated version being first produced which was then followed by an otherwise identical paginated version. Mr O'Shea complained that the late delivery of the full subsidiary protection decision raised a fresh ground not previously seen and he now wished to amend his statement of grounds to include a further ground arising from the decisions in *J.T.M. v. The Minister* [2011] IEHC 393 (Hogan J., leave stage) and [2012] IEHC 99 (Cross J., substantive stage). Mr Anthony Moore B.L., for the respondents, indicated that any such application would be contested. No motion to amend was brought in the interim but when the matter came on for hearing again on 30th October 2012, the applicant addressed the Court almost exclusively on that additional ground on which leave had neither been sought nor granted. In order to ensure that the applicant was not prejudiced by the initial confusion, the Court heard both parties on that additional ground.

8. The new ground advanced is essentially that the Minister misdirected himself in law as to the statutory definition of "serious harm" within the meaning of the *ECs (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006) ("the Protection Regulations") in that he posed the question *"Has the applicant already been subjected to "serious harm" (as defined in Reg. 2(1) /(Reg 5(2))"* and proceeded to answer it thus:-

> *"In accordance with Regulation 2(1), non-state actors can only be considered to be actors of serious harm if it can be demonstrated that the state, or parties or organisations controlling a state or a substantial part of the territory of that state, are unable or unwilling to provide protection against serious harm. It has not been demonstrated that Cameroon is unable or unwilling to provide protection against the treatment allegedly suffered by the applicant and therefore, the alleged inflictors of this treatment cannot be considered to be 'actors of serious harm' within the meaning of Regulation 2(1). As serious harm can only be carried out by 'actors of serious harm' within the meaning of Regulation 2(1), I do not find any evidence that [N.N.] has suffered treatment in Cameroon that would come within the definition of 'serious harm' as defined in Regulation 2(1)." (Emphasis added)*

9. It seems that the same paragraph has been reproduced in a number of subsidiary protection decisions made in 2010 and 2011. An identical finding was found to have been reached in error of law in *J.T.M.* The applicant in this case argues that this Court is bound by that finding and that the replicated error should have the same consequence as in J.T.M. and the decision in this case must be quashed. The respondents argue that the Court should depart from *J.T.M.* and adopt the reasoning of Cooke J. in *W.A. (DRC) v. The Minister* [2012] IEHC 251 where the same finding was replicated in a decision based on different facts but was not found to be in error.

Definitions

10. Before turning to the apparent conflict between *J.T.M.* and *W.A.* it is useful to first set out a number of relevant definitions found in the Protection Regulations which seek, among other things, to transpose Directive 2004/83/EC ("the Qualification Directive"). Regulation 2(1) of the Protection Regulations defines a "*person eligible for subsidiary protection*" as a person:

> *(a) who is not a national of a Member State,*
>
> *(b) who does not qualify as a refugee*
>
> *(c) in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in these regulations,*
>
> *(d) to whom regulation 13 of these regulations does not apply* Regulation 13 is an exclusionary clause; it excludes a person from eligibility for subsidiary protection where there are serious reasons for considering that the person has committed a crime against peace, a war crime, a crime against humanity or a "serious" crime; or has been guilty of acts contrary to the purposes and principles of the UN; or constitutes a danger to the community or to the security of the State.*, and*
>
> *(e) is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country".*

11. Thus a person applying for subsidiary protection must essentially establish that he would face a real risk of serious harm if returned to his country of origin and because of that risk is unable or unwilling to call on his own country to protect him. Regulation 2(1) provides that "*serious harm*" consists of:-

> *(a) death penalty or execution,*
>
> *(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or*
>
> *(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."*

12. Regulation 2(1) further defines *"Actors of … serious harm"* as including *"(a) a state, (b) parties or organisations controlling a state or a substantial part of the territory of that state or (c) non-state actors, if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against … serious harm."* This is a direct transposition of Article 6 of the Qualification Directive. The term *"Actors of … serious harm"* is not found elsewhere in the Regulations or in the Directive.

13. Regulation 5(1) of the Protection Regulations identifies certain matters which must be taken into account by the Minister (a protection decision-maker) when determining eligibility for subsidiary protection. Those matters include *"(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to*

… serious harm". Thus past serious harm is of relevance as is the risk of future serious harm. Regulation 5(2) further provides:-

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

14. The first part of Regulation 5(2) is a direct transposition of Article 4(4) of the Qualification Directive which provides:

> *"The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."*

15. It is evident that the final underlined sentence in Regulation 5(2) is an insertion created by the statutory instrument which does not appear in Article 4(4) or elsewhere the Directive. It is a basic principle of protection law that there must be a prospective risk of serious harm and the person concerned must be unable or, owing to that risk, unwilling to call on his home state to protect him. This is re-affirmed in Article 4(4) of the Qualification Directive insofar as protection will be refused if there are "*good reasons to consider that [past] persecution or serious harm will not be repeated*". However, that proviso is not reproduced in the Protection Regulations. Instead, the Regulation 5(2) insertion (described by Cross J. in *J.T.M*. as the "added tail") appears to empower the Minister to depart from the general principles of protection law and to afford subsidiary protection to an applicant who has established past serious harm (i.e. torture or inhuman or degrading treatment or serious and individual threat to his life owing to indiscriminate violence), even though that applicant may not face any repetition of the harm. Such discretion does not have an equivalent in the Qualification Directive. Its genesis is not easily established and as will be seen further, its vires have been doubted.

16. The Court speculates that by including the additional wording in Regulation 5(2), the intention was to expand the humanitarian exception to cessation contained in Article 1C(5) of the Geneva Convention (and s. 21(2) of the Refugee Act 1996) beyond the cessation context, to all persons seeking international protection. The Court's experience of a recent case involving revocation of refugee status indicates that very similar wording to that found in the additional sentence in Regulation 5(2) is found in Article 1C(5) of the Geneva Convention. That Article provides that refugee status is deemed to have ceased owing to a relevant change of circumstances unless the refugee "*is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality*". This is an exception which is based on general humanitarian considerations. The UNHCR Handbook (1992) at para. 136 explains the Article 1C(5) humanitarian exception and recommends its expansion outside of the cessation context:-

> *"It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the exception applies to "statutory refugees". At the time when the 1951 Convention was elaborated, these 'formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who--or whose family--has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee."*

17. This recommendation is reproduced in the Handbook as re-issued in 2011. In its *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention (the "Ceased Circumstances" Clauses)* (2003), the UNHCR gave further guidance on the "compelling reasons" exception:

> *"20. […] This exception is intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin or former habitual residence. This might, for example, include "ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons. It is presumed that such persons have suffered grave persecution, including at the hands of elements of the local population, and cannot reasonably be expected to return." Children should also be given special consideration in this regard, as they may often be able to invoke "compelling reasons" for refusing to return to their country of origin.*
>
> *22. Application of the "compelling reasons" exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice."*

18. The Court is driven to conclude that the Regulation 5(2) insertion expresses an intention to extend the humanitarian exception beyond the cessation context. The Minister thereby retained residual discretion to provide a form of quasi-humanitarian protection which is greater than the minimum level of protection required under the Qualification Directive, in the terms advocated by the UNHCR and the Executive Committee. The question of the compatibility of Regulation 5(2) with the requirements of Article 15.2.1° of the Constitution was not raised before the Court in the present case and so the Court will express no opinion on that issue at this time.

19. What then does "serious harm" mean in the context of Regulation 5(2) when read with the *compelling* reasons insertion? There are in the Court's view two ways of interpreting the Regulation 5(2) insertion. There is the literal approach taken by Cross J. and Hogan J. (i.e. that past serious harm *simpliciter* can be enough to engage subsidiary protection) and the purposive or teleological approach (i.e. that past harm alone cannot be sufficient as this would contravene international protection law) taken subsequently by Cooke J. in *W.A (DRC).* Applying the Qualification Directive and Protection Regulations to the impugned statement at paragraph 7 above, the Court will examine in turn the approaches taken by Cross J. in *J.T.M*. and Cooke J. in *W.A. (DRC).*

***J.T.M.:* A Literal Approach**

20. The facts of Ms. J.T.M.'s case are familiar as the matter previously came before this Court as a challenge to a decision of the Tribunal in early 2009. Ms. J.T.M. is a Nigerian national whose claim is that she was forced into an arranged marriage as a teenager with a man many years her senior. She said her marriage was not happy as her husband abused her because she was unable to bear children which she attributed to her sickle cell anaemia. She was subjected to a "healing" ritual in a forest where her belly and wrists were cut with animal claws and traditional herbal medicine was rubbed into the cuts. She was raped and sexually assaulted by the faith healer, her husband and other men who were present at the ritual. She demonstrated the scars to the Refugee Applications

Commissioner and claimed that the police would not provide her with any protection as they would accept her husband's actions as unremarkable. Her claim was rejected at first instance on a combination of negative credibility findings unrelated to her injuries and also on the finding that internal relocation would be available to her. The Refugee Appeals Tribunal appeared to accept her claim relating to the rituals but found that she could reasonably be expected to internally relocate rather than coming to Ireland as she had spent time in apparent safety in Benin City. Neither decision found that state protection was available to her.

21. When Ms. J.T.M. subsequently applied for subsidiary protection, she furnished the Minister with a medical report which indicated that the scars on her wrists and abdomen were highly consistent with the rituals she had described. Her claim was based on previous harm suffered which had not been doubted at the asylum stage. This fact immediately distinguishes her case from many others including the present case where credibility was not accepted at the asylum stage and where no objective evidence of injury or previous serious harm was available. In *J.T.M*. the Minister *accepted* that the applicant had suffered "serious physical injury" in the past but found that Ms. M. had not suffered "*serious harm*" within the meaning of the Protection Regulations because she had not shown that the Nigerian State was unable to afford effective protection against the non-State actors who caused her harm (i.e. her husband, the traditional healer and other men present at the ritual in the forest). The non-State actors did not therefore qualify as "*actors of persecution or serious harm*" as defined in Regulation 2(1). The controversial finding in J.T.M. was identical to the finding made by the Minister with respect to Regulation 5(2) in the present case, quoted at paragraph 7 above.

22. In examining the literal interpretation favoured by Cross J. it must be understood that when granting leave to challenge the legality of the Minister's finding that "*serious harm can only be carried out by actors of serious harm within the meaning of Regulation 2(1)*", Hogan J. referred to "*peculiar drafting curiosities*" in the Protection Regulations, and in particular he noted that certain articles of the Qualification Directive were transposed only in the definitional section of the Regulations and are not mentioned in the substantive sections. Hogan J. also identified difficulties with the meaning of "*serious harm*" and he granted leave on the following grounds:-

> *(a) The respondent … erred in law in concluding that because State protection was available in respect of the actions of non-State agents who inflicted serious injury on the applicant, the said injury could not amount to "serious harm" within the meaning of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006).*
>
> *(b) The respondent misconstrued and/or misapplied the provisions of Regulation 5(2) of S.I. 518 of 2006 in failing in the assessment conducted to consider whether, arising out of the previous harm suffered by the applicant, compelling reasons existed to warrant a determination that she was eligible for subsidiary protection.*

23. Cross J. agreed that the Minister had erred in law insofar as he found that "*serious harm*" can only be carried out by "*actors of serious harm*" and he found that neither the Qualification Directive nor the Protection Regulations require the term "serious harm" to be defined in that way. Relying on the actual wording of the Regulation 5(2) insertion he found that protection decision-makers are not precluded from considering harm committed by non-State actors even if effective state protection or internal relocation was available. He concluded:

> *"42. The respondent by first holding that the applicant had not suffered "serious harm" clearly would have failed to consider whether the grounds set out in the additional clause in Regulation 5(2) were engaged at all, i.e. "compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection".*
>
> *43. Whereas this clause does not create any new category of entitlement, in circumstances when the Minister has decided that the applicant had not suffered "serious harm", the clause could not arise at all in the Minister's consideration (given that the Minister's erroneous definition of "serious harm" had excluded the particular harm the applicant had suffered). Also, the Minister has decided that there was no "serious harm" then the fact that the applicant had indeed by any use of the English language suffered serious harm would not have been and was not considered by the Minister under the main body of Regulation 5(2) so he could not form the view that it was "serious indication" of the applicant's "well founded fear of persecution" or "real risk of suffering serious harm".*

24. As this Court understands the reasoning underlying his decision, the established fact that Ms J.T.M. had suffered inhuman or degrading treatment in the past was enough to establish "serious harm" and the availability of state protection or internal relocation was not relevant to that finding. The Minister assessed "serious harm" as harm inflicted by non-state actors where state protection or internal relocation was not available and therefore was in error in that he did not go on to consider whether the accepted serious harm could, together with "*compelling reasons*", warrant the grant of protection under Regulations 5(2).

W.A.: A Purposive Approach

25. The facts of *W.A.* are materially different from those of *J.T.M*. Mr W.A. claimed that he had been captured and arbitrarily detained by State forces for a period of two years in his country of origin, the DRC. His credibility was rejected by the asylum authorities and it was found that even if his claim were accepted as true, he would not be entitled to international protection as he could reasonably be expected to internally relocate. At the subsidiary protection stage, the Minister adopted the credibility findings of the asylum authorities that the applicant had not been held and maltreated by State forces. However, when assessing whether the applicant had already been subjected to "serious harm" for the purposes of Regulation 5(2), the Minister quite inconsistently stated that Mr W.A. feared non-state actors and he went on to use the same convoluted phrase as is challenged in this case and which was found to be in error in J.T.M. This was a clear error as, whether credible or not, Mr W.A. had always claimed to have suffered at the hands of the police and army who are of course State actors and not non-State actors.

26. Cooke J. found that there were arguable grounds for the contention that the particular section of the Minister's decision lacked coherence and consistency although he noted the possibility that it might emerge at the substantive hearing that this incoherence was not sufficiently material to vitiate the legality of the decision. He then took the opportunity to comment upon the legality of the Minister's finding that "*serious harm*" can only be carried out by "*actors of serious harm*". Noting the judgment of Cross J. in *J.T.M.*, Cooke J. warned against taking a literal common law approach to the interpretation of the Protection Regulations and found that any ambiguity arising from the construction of the Regulations could be resolved by recourse to a purposive construction in the light of the objectives of the Qualification Directive. He concluded:-

> *"39. […] International protection is only afforded when national protection is unavailable. National protection is to be treated as not available when the source or cause of serious harm is the State itself or its institutions, authorities, forces or agencies; or parties or organisations controlling the state or a substantial part of its territory. Where the cause or source of the feared serious harm is one not attributable to or controlled by the State or its agencies, it lies first with the State through its own forces or agencies to protect its nationals domestically against that source of harm.*

Thus, Article 7.2 makes it clear that national protection in the State of nationality will be taken to be available when the "State actors" defined in paras. (a) and (b) are shown to take reasonable steps to prevent the serious harm. It is only where those "State actors" are shown to be unwilling or unable to protect an individual against serious harm by "non-State actors" that the individual has a call upon the international community's promise of international protection.

40. The statement in the Determination that "serious harm" can only be carried out by " actors of serious harm" within the meaning of Regulation 2(1) is correct because, in practical terms, if the claim to a risk of serious harm is based upon a cause or source other than the State of nationality itself and its forces and agencies or parties or organisations controlling that State or a substantial part of its territory, national protection is taken to be available and international protection is therefore unnecessary provided it is shown that the "State actors" take reasonable steps to prevent the serious harm in question when perpetrated by "non-State actors". Thus "non-State actors" can become "actors of serious harm" only where it is not shown that the State of nationality is unable or unwilling to prevent the harm perpetrated by the non-State actors."

27. While Cooke J. granted leave on other grounds, he did not grant leave on the ground that the phrase used by the Minister was wrong in law, which he said was alluded to but not pressed before him.

Previous Decisions and Stare Decisis

28. As noted previously, the respondents urge the Court to depart from the reasoning of *J.T.M* and adopt the approach taken by Cooke J. in *W.A.* (DRC). Counsel for the applicant argues that the findings of Cooke J. were *obiter* and that this Court is obliged to follow the decision in *J.T.M.*, in accordance with the principles governing the binding nature of consistent High Court case law as restated by the Supreme Court in *Nazih Kadri v. Governor of Cloverhill* [2012] IESC 27. Having considered the Supreme Court decision this Court is satisfied that the applicant overstates the findings of the unanimous Supreme Court and does no service to the principle of *stare decisis* and further fails to identify the ratio in the *W.A.* and *J.T.M.* cases. The principle restated by Clarke J. *in Kadri* is not that one judge of the High Court must blindly follow every decision of every other judge of the High Court. Rather, he says that *"A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing*."

29. There are strong reasons for this Court to depart from the decision in *J.T.M*. not least because the current case lacks the crucial facts present in that case but also because the meaning of the Regulation 5(2) insertion was examined in two earlier decisions of the High Court in *Fr N. & and Others v. The Minister* [2008] IEHC 107 (Charleton J.) and *M.S.T. and J.T. (a minor) & Another v. The Minister* [2009] IEHC 529 (Cooke J.), both of which reach conclusions which seem to this Court to be at variance with the judgments of Hogan J. and Cross J. in *J.T.M*. It must also be observed that *J.T.M*. concerned uncontested serious injury inflicted by non–state actors *simpliciter* and therefore is distinguishable from the background to *M.S.T., Fr. N*. and *W.A.* and indeed the present case, where the credibility of the applicants' narratives of past serious harm was not accepted.

30. The judgment of Charleton J. in *Fr. N*. is illustrative. At paragraphs 65-66 he said:

"It has been argued that where an applicant for subsidiary protection has already suffered trauma in the past, an entitlement to subsidiary protection arises under regulation 5(2). This would mean that any person who has suffered a violent assault in the past would be entitled to come to Ireland and obtain the benefits as to health, housing and welfare that those entitled to subsidiary protection enjoy under the Directive as transposed into Irish law. I do not read the second part of regulation 5(2) as creating a right to subsidiary protection which differs from, or is an addition to, the rights already declared by Directive 2004/83/EC. Rather, it is a means of assessment as to what has happened to the applicant. Such an assessment can give rise to a compelling reason for not returning them to their country of origin. It could be the case that by reason of the harm which an applicant for subsidiary protection had already suffered, that considerations might arise which warranted a determination that an applicant should be allowed to remain in the State. However, that determination is dependant upon a decision that "the applicant is eligible for protection", and this only arises where they otherwise fit within the definition giving rise to the entitlement for subsidiary protection in the first instance. I believe this interpretation is correct because, in addition to that reason, an entitlement to subsidiary protection only entitles a person to stay in the State until the situation in their country of origin changes for the better. During that time, they are entitled to health, and social welfare benefits which are entitlements arising in favour of Irish citizens and European Union citizens under separate Acts of the Oireachtas that the Minister is not entitled to amend by secondary legislation since nothing in the Directive requires that any person who has suffered a trauma in the past thereby becomes eligible for subsidiary protection. As the Supreme Court unanimously held in the passage in Quinn v. Ireland, [2007] 2 I.L.R.M. 101 (per Denham J.) at pp. 108 and 109:-

> "To provide that a law may be amended by statutory instrument as in the European Communities Act, 1972, is an exceptional power given by the Oireachtas, pursuant to the Constitution, to a Minister. It was necessitated by the obligations of membership of the European Communities, which itself gave rise to a high volume of technical regulations based on Community law. Such power would, in general, be an impermissible delegation of legislative powers, without the specific legislative and constitutional foundation.
>
> I am satisfied that it would be a step too far to infer such a power in an Act which did not expressly provide for such a power. Further, I am satisfied that to make such an inference would be to legislate - a matter for the Oireachtas, not a court of law.
>
> Indeed, it would be an unconstitutional construction of the Act of 1993. There being a constitutional construction to the provisions open, then that is the correct construction. In essence, the power created in s. 3(2) of the European Communities Act, 1972 is not in the Animal Remedies Act, 1993, and that is fatal to the argument of the respondents. At its height the drafting is ambiguous.
>
> Consequently, the Animal Remedies Act, 1993 not containing any such constitutionally valid express power to the Minister to amend a regulation having statutory effect, I am satisfied that the Minister does not have such power. Therefore, the Minister does not have the power to make regulations to amend previous regulations which he has made under the Animal Remedies Act, 1993 as the original regulations made by the Minister have 'statutory effect'. The fact that new regulations would have the same status as the previous regulations does not meet the problem that statutes may not be amended by statutory instruments unless expressly and constitutionally so provided, as in the European Communities Act, 1972. Such power is a delegation of legislative power only constitutionally sound because it is necessitated by the obligations of the European Community. The issues raised by the absence of the express power to the Minister are fundamental in a parliamentary democracy. A democratic deficit is an issue to be

determined by the Oireachtas. It is only when that body expressly and constitutionally delegates its great power that the power may be exercised by a Minister."

66. It is only if the situation of the country of origin gives rise to the need for subsidiary protection that any issue as to internal relocation needs to be considered as to any obligation devolving on an applicant. If, on a fair appraisal of the country of origin information, resort may be had to a substantial part of the territory of origin of the applicant, then consideration should be given to the personal circumstances of the applicant and as to whether it is reasonable to require him or her to go to that territory and to stay there. It is difficult to see how international relocation by subsidiary protection is an entitlement specific to a person who has suffered from a violent or sexually violent assault in the past where the legislation places on them an obligation to seek internal relocation when they are under active threat in the present."

31. In the later case of *M.S.T.*, Cooke J. was required to consider – among other issues – the interpretation of the additional wording in Regulation 5 (2) and the question of whether the Minister as a protection decision maker was obliged to consider whether previous serious harm alone could have warranted the grant of protection. Cooke J. examined the terms of the Qualification Directive and the Procedures Regulations and noted the previous views expressed by Charleton J. in the *Fr. N.* case. Cooke J. found that:-

"28. In the present case … Article 4.4 has been fully transposed verbatim by Regulation 5(2) but the Minister appears to have gone further by the inclusion of the additional wording. The common parts of Regulation 5(2) and article 4.4 could be paraphrased as follows:

(i) A claim to face a real risk of suffering serious harm must be regarded as having substantial grounds if the applicant establishes as a fact that he or she has already been subject to serious harm or to direct threats of such harm;

(ii) The claim need not, however, be so regarded if there are good reasons to consider that such serious harm or threats will not be repeated.

29. The ordinary meaning of the additional wording appears to be that, what might be called a "counter-exception" to para (ii) above is created to the effect that, even if there is no reason for considering that the previous serious harm will now be repeated, the historic serious harm may be such that the fact of its occurrence alone gives rise to compelling reasons for recognising eligibility. While that appears to be the ordinary meaning of the additional wording it is not immediately clear how it is to be given effect in the context of the concept of subsidiary protection.

30. […] subsidiary protection is accorded to someone who is not a refugee but is nevertheless in need of international protection. A person is eligible only when, if required to return to the country of origin he or she would "face a risk of serious harm". The risk of serious harm is thus one which is faced only on return to the country of origin. The person must be unable or, owing to that risk, be unwilling to avail of protection in the country of origin. If the meaning of the expression "person eligible for subsidiary protection" is read into the additional wording, the phrase becomes something of a non-sequitur: - "compelling reasons arising out of previous serious harm alone may nevertheless warrant a determination that the applicant is a person who, if returned to his or her country of origin, would face a real risk of suffering serious harm". If, however, on return, there is no danger of the previous serious harm being repeated, as the criteria of the common parts of the two provisions appear to envisage, it is difficult to understand in what would lie the real risk of serious harm upon return.

31. That there must be a continuing real risk of further or other serious harm upon return when eligibility is recognised, is reaffirmed by the wording of Regulation 14 (1) (a) and (2) (transposing Article 16) which provide that subsidiary protection may be revoked if the circumstances which led to its grant ceased to exist or have changed to such a degree that international protection is no longer required, provided that the change of circumstances is "of such significant and non-temporary nature that the person no longer faces a real risk of serious harm".

32. Notwithstanding the difficulties presented by the additional wording, there cannot be any doubt, in the Court's view, that the additional wording can only be construed as intending to permit some limited extension to the conditions of eligibility prescribed in article 4.4 designed to allow some latitude in according subsidiary protection based exclusively upon the fact of previous serious harm when it is accompanied by compelling reasons. It is relevant to bear in mind that "serious harm" is defined as including "inhuman or degrading treatment". (See para. 23 above.) It is possible therefore to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because the return itself could be so traumatic as to expose the applicant to inhuman or degrading treatment.

33. The Court is accordingly satisfied that the additional wording does have some limited effect in extending the possible scope of application of article 4.4. In particular, the wording appears to be designed to grant some latitude to the Minister to recognise eligibility for subsidiary protection in a case of proven previous serious harm giving rise to compelling reasons for according international protection notwithstanding the fact that there may exist some doubt as to the likelihood of risk of repetition of that previous serious harm."

32. He then went on to agree with the view expressed by Charleton J. in *Fr. N.* that the additional wording in Regulation 5(2) does not operate so as to create a distinct new criterion for entitlement to subsidiary protection over and above that contained in Article 4(4) of the Qualification Directive. He found that:-

"The additional wording falls, as indicated above, to be regarded as facilitating the application of the basic provision contained in article 4.4 and elsewhere in Regulation 5 (2) by clarifying how evidence of facts and circumstances relating to incidents of previous serious harm may be assessed. It is purely facultative: "may nevertheless warrant". The words to not give rise to a new entitlement as such. They merely allow the protection decision-maker the facility in a case of compelling reasons, to determine eligibility as established without being obliged to be fully satisfied that the harm runs a risk of being repeated."

33. These findings differ from those made in *J.T.M.* but again it must be recalled that a rather unique factor in the latter case was the

uncontested evidence of the serious physical harm described by the applicant and the failure of the Minister to consider whether it had a role in her claim for protection at all. The Minister went no further than finding that harm to be irrelevant because it was carried out by non-state actors where internal relocation or state protection was a viable option. This was the reason the inelegant phrasing and import of the impugned paragraph was found by Cross J. to be in error.

Application to the present case
34. If a literal approach is applied to the interpretation of the term "serious harm", it would appear that the Minister has erred in law insofar as he has found that "serious harm" can only be perpetrated by "actors of serious harm" as defined in the Protection Regulations. However, when dealing with EU protection law, the Court prefers the approach adopted by Cooke J. in *W.A.* and the previous decisions of Charleton J. in *Fr. N.* and Cooke J. in *J.T.M.* and agrees that a purposive approach should be applied to EU Directives and the measures by which such Directives are implemented in Ireland. Interpretation of the terms specific to the Qualification Directive should not be considered and interpreted in isolation from its overall object and purpose which is to set down minimum standards on the qualification and status of third country nationals or stateless persons as refugees or as persons who are otherwise in need of international protection. No person is eligible for protection under that Directive *unless there are substantial grounds for believing that the person, if returned to his country of origin :-*

> *i. Faces a real risk of suffering serious harm and*
>
> *ii. Is unable or, owing to that risk, is unwilling to avail himself of the protection of his country of origin.*

35. At the risk of repetition, the distinction between state actors and non-state actors comes into play when assessing the availability of state protection because if the risk of serious harm emanates from agents of the State, the injured person can hardly seek or expect to find state protection. On the other hand if the risk emanates from a private dispute, it is presumed until the contrary is shown that a State can and does effectively protect its citizens against such risk. Unless both (i) and (ii) above are established, an applicant is deemed not eligible for subsidiary protection. This is the fundamental premise on which the system of protection functions: states are not required to provide surrogate protection to foreign nationals whose home states are capable of protecting them and are willing to do so.

36. The added wording of Regulation 5(2) is uniquely a feature of domestic law. It provides discretion to grant subsidiary protection where "*compelling reasons*" exist and does not simply rest on an assessment of inhuman or degrading treatment in the past, or whether before he came to Ireland there was a serious and individual threat to his life by reason of indiscriminate violence. In accordance with the general principles applicable to protection law, the decision maker must identify the source of such treatment whether from state or non-state actors and, if from non-state actors, whether effective state protection was available as an antidote to the treatment or threat. To do otherwise would be to interpret the additional words in a manner which is at variance with the general principles of international protection law and the specific principles of the Directive. Having made a determination that the applicant suffered serious harm and was without protection but is no longer at risk, the Minister can in his discretion nevertheless recognise the applicant as in need of protection because of the special – *compelling* – reasons which exist. It may be for example that the evidence suggests that the nature of the harm suffered in the past is such that the person would suffer persistent adverse consequences if returned to his country of origin; that the person has a justifiable mistrust of his country origin or its nationals; or that the past harm has deprived the person of the emotional wherewithal to return to live in that State. For instance, returning a sole Tutsi survivor of a massacre to Rwanda or a similarly placed Bosniac survivor of the Ahmici massacre to Bosnia might give rise to such protection even though the conflict in both countries is at an end. While such compelling reasons may traditionally be advanced in support of a claim to humanitarian leave to remain, the Minister has retained discretion to grant subsidiary protection status in such circumstances where it is accepted that the conditions for eligibility were fulfilled in the past.

37. On the facts of this case, whether the approach adopted is literal or purposive, it cannot avail the applicant. The error identified in J.T.M. in the phrase "*serious harm can only be carried out by 'actors of serious harm' within the meaning of Regulation 2(1)"* was found on its particular facts to vitiate the entire decision. It does not follow that the replication of the impugned paragraph in other cases will lead to the same result. The error as to the meaning of "serious harm" only has relevance to the lawfulness of a subsidiary protection decision where it is accepted that the applicant has suffered serious harm in the past. In this case, the applicant's account of abduction and enforced marriage by the village chief who subjected her to three days of beatings, non-consensual sex and incarceration was rejected by the Refugee Applications Commissioner and the Refugee Appeals Tribunal and those decisions were not challenged by way of judicial review. The negative credibility findings were adopted by the Minister as no information or materials were put before him which questioned those findings. Thus, there was no objective evidence of past serious harm. Moreover, in contrast to *J.T.M.*, the applicant's subsidiary protection application contained no reference whatever to eligibility under Regulation 5(2).

Summary
38. The Court is satisfied that the approach taken in *Fr. N., M.S.T.* and *W.A.*, employing a teleological method of interpretation with regard to the added wording in Regulation 5(2), is more in keeping with the spirit and purpose of the Geneva Convention on the Status of Refugees 1951 and Directive 2004/83/EC than the narrow, literal approach adopted in *J.T.M.* For completeness, however, even if the Minister erred in defining "*serious harm*" by reference to the availability of state protection or internal relocation as found in *J.T.M.*, it had no relevance to the claim in this case. In the absence of accepted serious harm in the past, no person can be eligible for protection under Regulation 5(2). The applicant quite simply cannot succeed on this ground. The application fails and the reliefs sought are refused.