THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1220 J.R.]

BETWEEN

W.T.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of February, 2016

1. The applicant was born in Cameroon in 1992. He claims to have been the victim of a local custom regarding tribal succession. He was reluctant to accept a traditional leadership role and claims he was put at risk from family members. His general credibility appears to have been accepted by the Minister.

2. On 22nd September, 2009, his mother made a complaint to police regarding the threats emanating from family members. However, later on the same day she withdrew the complaint stating that she had been promised it would be dealt with within the family.

3. On 23rd October, 2009, the applicant came to Ireland as an unaccompanied minor.

4. He applied for asylum, and his application was duly refused by the Refugee Applications Commissioner and, on appeal by the Refugee Appeals Tribunal. The tribunal, on appeal, considered that he could internally relocate within Cameroon. The applicant turned 18 in 2010.

5. He applied for subsidiary protection, but was refused that status by the Minister on 30th November, 2011. The Minister also made a deportation order against him.

6. The present proceedings were filed on 22nd December, 2011, only slightly out of time having regard to the 14-day time limit in force at that point in respect of such applications.

7. On 11th July, 2013, the deportation order was revoked by virtue of the applicant's acquisition of the status of family member of a recognised refugee.

Particularisation and amendment of Pleadings

8. At an early stage in the hearing, Mr. David Conlan Smyth, S.C. (who appeared with Ms. Catherine Duggan, B.L.) for the respondent complained that the statement of grounds was inadequate insofar as it related to an allegation that "*serious harm*" had not been properly analysed. It was agreed that an amendment of the pleadings to particularise this claim would be allowed on consent.

9. However, in the immediate aftermath of initially having reserved judgment in this case, on a further review of the papers, I had a preliminary concern that it was possible that a number of other submissions made at the hearing had not been adequately set out in the pleadings, and indeed that other issues relating to the meaning of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006), which were adverted to in the respondent's written submissions, had not been adequately developed at the hearing. Of course such a preliminary concern was in the context that I had not at that point made any, still less any final, decisions about what points needed to be addressed or how. I therefore drew the attention of the parties to these possible issues and to whether or how they might be accommodated in the statement of grounds, subject to submissions.

10. In this regard, I would observe that courts have, on occasion, taken very significant points of their own motion. For example, in *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29, the Supreme Court noted without apparent disapproval (see judgment of Fennelly J. at para. 2) that Hogan J. had, of his own motion, taken a point as to the validity of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 in terms of EU law.

11. In *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473, Hogan J. took an important point of his own motion after having reserved judgment, and reconvened the hearing to invite further submissions on it.

12. Holding judicial office has one advantage over the role of advocate, namely the capacity to do something about the *esprit d'escalier* that potentially affects all participants in the process of a hearing; what O'Donnell J. refers to as "*the principle of delayed eloquence, which is the constant and unforgiving companion of any conscientious advocate*" (*The People (D.P.P.) v. Rattigan* [2013] 2 I.R. 221 at 245). If, following the reserving of judgment, a judge, applying further thought and contemplation to the matters argued, comes to the view that some issue in the case was not, on reflection, fully pleaded or developed, the court is not without options. Further judicial thought and reflection before a final decision should be encouraged rather than the opposite (see recent comments of the U.S. Supreme Court in *White v. Wheeler* (2015) 577 U.S. slip op. at p. 8, *per curiam*)

13. Of course a court can, and often does, leave such points to one side and focus solely on only those arguments expressly made at the hearing which squarely come within the four walls of the pleadings. It can alternatively, as Hogan J. did in J.K. reconvene the hearing and take the point of its own motion. Or it can draw the parties' attention to the matter and leave it to the parties to take the point or not, an approach for which I expressed a preference in *S.O. v. Minister for Justice and Equality* [2015] IEHC 821. That is the approach I endeavoured to take in this case.

14. Following the foregoing developments, Mr. Michael Lynn, S.C. (who appeared with Ms. Anne Fitzpatrick, B.L.) for the applicant, sought a number of amendments to the pleadings. While Mr. Conlan Smyth objected to the lateness of any amendment, and to the fact that the statement of grounds had gone through four versions, the original statement and draft amended versions dated 1st, 7th and 14th December, 2015, ultimately, such objections are not persuasive. A court in such circumstances is not absolutely compelled to freeze the case as of the moment judgment is reserved. As long as the court retains seisin of the matter, further matters can be brought to the attention of the parties, or indeed, as sometimes happens, the parties may spontaneously wish to bring additional matters to the attention of the court. In *The People (D.P.P.) v. Murphy* [2015] IECA 300 (Court of Appeal, Birmingham J, 6 November 2015), it was recently held that the Special Criminal Court should have halted its deliberations having retired to consider its verdict, given the handing down of a judgment by the Supreme Court in the course of those deliberations, and its verdict was set aside on appeal as a result of failing to do so.

15. The fact that the present application is a leave application telescoped with the substantive hearing is another reason (if such be required) for flexibility in terms of debate between the court and the parties as to the appropriate wording of the grounds. In the context of a normal leave application, such debate is relatively routine and often results in a slimming down of the grounds originally advanced.

16. Mr. Conlan Smyth relied on the decision of McDermott J. in *S.J. v. Refugee Applications Commissioner* [2014] IEHC 108, in which the court was not willing to permit an amendment which cut across the agreement by the respondents to agree to a telescoped hearing, thereby facilitating the court and the applicant. Mr. Conlan Smyth fairly acknowledges that *S.J.* does not discuss the decisions in *Keegan v. Garda Siochána Ombudsman Commission* [2012] 2 I.R. 580 and *O'Neill v. Applebe* [2014] IESC 31 (which I dealt with at length in *B.W. (No. 1) v. Refugee Appeals Tribunal* [2015] IEHC 725).

17. However, under the amended O. 84 r. 24, the court has a discretion in the interests of justice to require the telescoping of a judicial review hearing, independently of the agreement of the parties. Given the statutory priority that must be afforded to asylum-related judicial reviews under s. 5 of the Illegal Immigrants (Trafficking) Act 2000, this appears to me to be a discretion that the court should normally exercise, independently of whether the parties' agreement to telescoping or not. While I, of course, appreciate that the parties in the present case have agreed to the telescoping of the hearing, it is only fair to record that if they had not, and if this case was listed as a leave application only, I would have strongly considered exercising the jurisdiction to telescope is independently of the views of the parties. Such an approach is consistent with the most efficient use of court resources as directed by the Supreme Court in *Talbot v. Hermitage Golf Club* [2014] IESC 57.

18. On the basis that telescoping should be the default approach in an asylum context, whether the parties want it or not, I would not regard the fact that the respondents have agreed to telescoping as a significant reason to refuse an amendment. In any event, the attitude adopted by the respondents is only one factor in the equation and a stance of objection is not equivalent to proof of prejudice, as I discussed in *B.W. (No. 1).*

Categories of amendment sought

19. Mr. Lynn sought amendments falling into three categories.

20. The first category related to the deletion of the challenge of the deportation order and the associated grounds. This was agreed to by the respondents.

21. The second category related to the particularisation of matters originally pleaded (being all remaining amendments other than section 5(9)(b) and (d) of the statement). Mr. Conlan Smyth described these proposed amendments as unnecessarily "*elaborate particularisation*" and objected to them, albeit rather faintly. Indeed by basing the objection on unnecessary particularisation, the respondents acknowledge that the issues come within the existing pleadings, the only issue being whether they need to be expressly particularised or not. The court has in any event a discretion under O. 84 r. 20(4)(b) to direct particularisation of pleadings. More fundamentally, I would owe it to any higher forum (should that arise) to ensure, insofar as I can, that the paperwork is in order, and there is no mismatch between the points that the parties wanted to put before the court and those set out in pleadings, so that there can be no issue as to what was or was not properly before the court.

22. The third category of amendment relates to the more substantial points at para. 5(9)(b) and (d) of the proposed amended statement, which relate to definitions in the 2006 regulations and Directive 2004/83/EC (the qualification directive). Mr. Conlan Smyth categories these as new points and submits that argument in relation to these points was not made by the applicant at the hearing. However, as I have already observed, the issue relating to the definitions in the 2006 regulations is flagged in the respondents' own legal submissions and so was before the court to that extent. Furthermore, these points relate to the interpretation of the regulations, a matter that cannot be shirked by the court even if the parties do not wish to explore it. It is not possible to come to a view on whether the subsidiary protection decision in this case complies with the regulations or not without first coming to review what the regulations actually mean.

23. I appreciate that there may come a point where an amendment is so major as to be such that the court would be reluctant to permit it: *Copymoore Ltd. v. Commissioners of Public Works of Ireland*, [2014] IESC 63, *per* Charleton J . However, for the reasons stated, we are some distance from that point in this case. Fundamentally, the court must keep the interests of justice firmly in mind as stated by O'Donnell J. in *O'Neill.* Fennelly J. in *Keegan* emphasised that a party should not be deprived without good reason of the opportunity to argue a significant point. A similar approach was taken recently by Posner J. in *Reed v. Illinois* (Case 14-1749, U.S. Court of Appeals for the 7th Circuit, 30th October, 2015) at p. 9: "*What is unfair in the present context is to deny, without a good reason, a party's right to press a potentially winning argument.*"

The test for allowing amendment

24. As set out in *B.W. (No. 1),* the essential tests as to whether an amendment should be allowed relate to arguability, explanation and lack of irremediable prejudice. I decided on 3rd February, 2016 to allow the amendments and I now set out reasons.

25. As regards arguability, I am satisfied that the points were arguable.

26. As regards explanation, Mr. Lynn's solicitor has furnished a letter which essentially asserts that the applicant's legal advisers considered that the points they wished to make were already adequately set out in the statement of grounds. Insofar as that statement can be criticised for a lack of particularity, a failure by the applicant's legal advisers to appreciate this constitutes an error of the kind bringing it within the Keegan decision. Insofar as the issues relating to the definition in the 2006 regulations are concerned, Mr. Lynn told me at the hearing relating to the amendments that the point simply escaped him until I raised it with the parties. Even then, he says the applicant's legal advisers did not fully appreciate the point until it was considered further at a later stage, hence the revised statement of grounds that did not include this allegation, which then had to be replaced with a further

revision when he did appreciate the point. While the latter aspect is certainly unfortunate, such an oversight is simply not capable of being explained further, beyond what Mr. Lynn calls "*simple human fallibility*". Again this constitutes an adequate explanation for Keegan purposes. In any event, I emphasise that this was not a new point. It emerges clearly from the respondents' submissions delivered before the hearing, but its relevance to the case was not immediately apparent at that initial hearing.

27. As regards lack of irremediable prejudice I do not consider that the respondents have been prejudiced, and I have afforded them the opportunity to make further oral and written submissions in reply to all issues.

28. Mr. Conlan Smyth was concerned as to possible prejudice in terms of any potential need to appeal a decision arising from such amended ground. However should it arise as a consequential matter, I would in this case, or indeed in any case, be open to entertaining any submission that I should make a declaration as to the legal position if that was necessary or appropriate in order to give a party something to appeal against (or to apply for leave to appeal against) should they wish to do so. That was the course I took in *Li v. Minster for Justice, Equality and Law Reform (No. 2)* [2015] IEHC 747 where I indicated I might have granted a declaration as to the legal position "*if there was some identifiable added value in granting a declaration, for example, by facilitating a party in applying for leave to appeal if they might be handicapped in doing so in the absence of a declaration against which such appeal could be brought"* (para. 7).

Should the proceedings be struck out because the applicant now has recognition as the family member of a refugee?
29. Mr. Conlan Smyth submitted that, because the applicant has been given permission to remain as the family member of a recognised refugee, no useful purpose could be served by his current challenge to refusal of subsidiary protection, because the rights available on subsidiary protection were the same as those he enjoyed as a family member of a refugee.

30. A high constitutional value must attach to the applicant's right of access to the court. The applicant should not be deprived of the opportunity to advance his proceedings unless it can be shown that there is no possible advantage to be gained by the proceedings. Mr. Lynn submitted that there were a number of potential advantages to the applicant above and beyond his current status, if he was successful in obtaining subsidiary protection.

31. It seems to me that this submission is well-founded. While, in general, very little would change for the applicant if he was granted subsidiary protection and such a status would be superior to his current position as a family member of a refugee for a number of reasons:-

> (i) Receipt of subsidiary protection is a substantive personal right.
>
> (ii) Status as a family member of a refugee is derivative to the status of a refugee. This derivative status could be terminated if the family member's refugee status is revoked. As such, the applicant is at risk of losing his derivative status through no fault of his own, if for example, the family member were to move to and obtain the nationality of another state, leading to a revocation of refugee status under s. 21(c) of the Refugee Act 1996.
>
> (iii) If the applicant obtains subsidiary protection for himself, he would then have individual personal rights which could, in turn, generate knock-on rights for other family members of his own.
>
> (iv) While current legislation postulates a similarity or even equality of rights as between family members of refugees and those benefit from subsidiary protection, such legislation could change at some point in the future.
>
> (v) The correspondence issued to the applicant by the Department, which was put before me in a supplemental affidavit by Mr. Morgan McKnight, shows that a host of conditions attached to the applicant's current status. It has not at all been established that these conditions would apply to subsidiary protection if the applicant was ultimately successful in that regard.

32. Without taking away from the basic submission that the rights of the applicant that he now enjoys by virtue of s. 18(3)(a) of the Refugee Act 1996, are similar to rights which he potentially would obtain under the status of subsidiary protection by virtue of reg. 19 of the 2006 regulations, it seems to me that, if any advantage could be demonstrated to his having subsidiary protection, this would be sufficient to justify his maintenance of the present proceedings. As a number of potential advantages have been identified, the question of exercising discretion to refuse relief by reason of his current status simply does not arise. The applicant should not be deprived of the right to pursue these proceedings given that he has demonstrated a potential advantage in doing so.

33. Some argument was also addressed to me at the hearing in relation to the duration of permissions. At the present time, refugee status is indefinite, effectively permanent unless revoked whereas subsidiary protection is for a limited period of three years, at least, initially. Ireland appears to be one of a very limited number of countries that give effectively permanent residence to any recognised refugee. No clear reason was advanced to me as to why this should be so. The international protection of refugees does not require that refugee status be permanent. There would certainly seem to be a case for refugee status to be provided for a limited period of years in the first instance and then perhaps reassessed as to its continuing necessity prior to the grant of permanent residency. That appears to be the policy which arises under the International Protection Act 2015.

The test for subsidiary protection
34. Legal provision for the provision of subsidiary protection is set out in the 2006 regulations, which give effect to the provisions of the qualification directive.

35. During the hearing, Mr. Conlan Smyth was notably anxious to focus the argument away from the 2006 regulations and towards the qualification directive, perhaps for reasons which may shortly become all too apparent.

36. Regulation 4(4) provides that "[*w]here the Minister determines that an applicant is a person eligible for subsidiary protection, the Minister shall grant him or her permission to remain in the State."*

37. The key definition, therefore, is *"person eligible for subsidiary protection"*. That term is defined by reg. 2(1):-

> *"person eligible for subsidiary protection' means 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, and

(e) is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

38. The real core of the definition is para. (c), that substantial grounds have been shown for believing the person would face a real risk of serious harm. One might note in the definition the first creaking signs of defective drafting, because the phrase "as defined in these Regulations" is entirely inappropriate and unnecessary having regard to the words "In these regulations" at the start of reg. 2(1), and to inveterate drafting practice.

39. One then turns to the definition of "*serious harm*". This phrase is defined in reg. 2(1) as follows:-

"'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."

40. What is extraordinary in the drafting of the 2006 regulations is that they do not expressly incorporate in the definition of the test for granting of subsidiary protection the restrictions that serious harm must emanate from actors of serious harm, and must be subject to protection against persecution or serious harm, as contemplated by the qualification directive.

41. Starting with "*actors of persecution or serious harm*", provision is made in art. 6 of the directive that actors of persecution or serious harm will include a state, organisations controlling a State or a substantial part of it, or other actors if the state or such organisations do not provide protection against persecution or serious harm.

42. A definition of "*actors of persecution or serious harm*" is attempted in reg. 2(1) of the 2006 regulations. As noted above, that provision begins "[*i]n these Regulations –"* and there then follow a number of definitions of which "*actors of persecution or serious harm*" is one.

43. Astonishingly, that phrase is not used anywhere else in the regulations. It is an axiomatic principle of definition that a definition is not a substantive provision. The definition of a term which is not itself used in any other provision of legislation is meaningless and extraneous to the interpretation of the rest of the legislation. It would be an abuse of principles of interpretation to hold that a regulation headed "*interpretation*" which stated that *"[i]n these Regulations"* a particular term (which was not used in the regulations) had a meaning, but would affect, expand or restrict the meaning of some other phrase used in the regulations, particularly where that phrase ("*serious harm*") is itself defined, without any reference to the actors who may be carrying it out.

44. One then turns to the definition of "*protection against persecution or serious harm*", which is defined in reg. 2(1) as follows:-

"'protection against persecution or serious harm' shall be regarded as being generally provided where reasonable steps are taken by a state or parties or organisations, including international organisations, controlling a state or a substantial part of the territory of that state to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection."

45. I have already referred to the fact that the definition of "*actors of persecution or serious harm"* is freestanding and meaningless. Unfortunately, the same applies to the definition of "*protection against persecution or serious harm*". Apart from where it appears in the definition itself, there are only three other references in the regulations to that phrase, as follows:-

(i) The first is in the definition of "*actors of persecution or serious harm*". As already been explained, that is a statutory dead-end, and nothing substantive is achieved by a definition within a definition which, itself, is not used anywhere in the regulations.

(ii) The phrase is also used as an exception to the definition of "*protection*". That definition defines the word "*protection*" subject to a phrase that it is so defined "*except in the definition of 'protection against persecution or serious harm'*". This is also a statutory dead-end. It merely states that the definition of "*protection*" does not apply within the definition of "*protection against persecution or serious harm*".

(iii) The phrase is also used in reg. 8, which relates to "*control of a State or substantial part of its territory by an international organisation*". That reg. provides that regard shall be had to guidance in relevant Council Acts, "*for the purposes of assessing whether an international organisation controls a State or a substantial part of its territory and provides protection against persecution or serious harm"*. It is clear that this is not a substantive provision either, as it is only an interpretative provision for a particular specified purpose. That purpose relating to extent of control over the State or a substantial part of its territory only arises within the definition of "*protection against persecution or serious harm*" itself. Thus, this third and final use of the phrase also leads nowhere except in a circular manner back to the definition itself.

46. Thus, the definition of "*protection against persecution or serious harm*" simply is not used in any substantive provision of the regulations. It is not part of the statutory definition of the test for grant of subsidiary protection. Like the definition of "*actors of persecution or serious harm"*, it is simply a statutory dead-end.

47. On any view, the drafting of these regulations has been botched beyond belief. Two important concepts have been locked into definition of provisions which, are not, themselves, used in substantive provisions of the Act. It would contravene recognised principles of interpretation to rewrite the regulations in order to insert these provisions into the appropriate substantive parts of the regulations. This is something I would decline to do for a host of reasons:

(i) It is not open to the court to correct an omission or error in a statute: *A.B. v. Minister for Justice* [2002] I.R. 296 *per* Keane C.J., cited in *D.P.P. v. Carter* [2015] IESC 20 *per* Hardiman J. at para. 13.

(ii) To rewrite the regulations in this manner would amount to a usurpation of the regulation-making function of the Minister.

(iii) Fundamentally, it is by no means easy to see precisely what correction should be made. To give life to the phrases defined, those phrases would need to be inserted into the body of the regulations. But precisely where? Clearly significant questions of meaning and policy choices could arise in relation to the exact placing of these terms. Those are matters for the executive branch of government. It is not permissible for the court to decide where these terms should be inserted into the body of the regulations.

(iv) An alternative interpretation that is just as valid as the one that these definitions should be regarded as substantive is that the terms defined in reg. 2(1) were *originally* intended to be substantively used in an earlier draft of the 2006 regulations, but the drafter then removed them from the body of the regulations but overlooked the need to also delete them from the definitions section. To give effect to those definitions by judicial *fiat* would in that event be to nullify the drafter's intent. This simply illustrates the inappropriateness of the court attempting to impose its own view of what the regulations should have said over and above what they clearly actually say.

48. For the foregoing reasons I must regard the definitions as ineffective.

49. This is not the end of the matter however given reg. 2(2) of the regulations, which provides that "*A word or expression that is used in these Regulations and is also used in the Council Directive shall have in these Regulations the same meaning as it has in the Council Directive unless the contrary intention appears.*"

50. Thus the term "*serious harm*" falls for consideration in the present context (or "*persecution*" in the asylum context). That term must therefore be construed in accordance with the directive (as required by reg. 2(2)). It clearly must therefore be construed by reference to the use in the directive of the terms "*actors of persecution or serious harm*" and "*protection against persecution or serious harm*". As Hogan J. put it in *J.T.M. v. Minister for Justice, Equality and Law Reform (No. 1)* [2011] IEHC 393, "*the references to 'serious harm' in the Directive must be read in the light of the substantive provisions of Article 6 and Article 7"* (para. 27). While neither term is included in art. 2 ("definitions") of the directive, that is not the test in reg. 2(2), which refers to the "*meaning*" the term has in the directive. It is clear from the directive that "*actors of persecution or serious harm*" has the meaning set out in art. 6, which is indeed headed "*actors of persecution or serious harm"*. That article in turn refers to "*protection against persecution or serious harm as defined in Article 7*". I should therefore take art. 7 as defining the latter phrase for the purposes of the directive, and therefore of the 2006 regulations having regard to reg. 2(2). It is important to note that the meaning of these expressions is thus ascertained by reference to reg. 2(2) of the regulations themselves and not to definitions within the regulations, which as I have said are free-standing and thus sterile.

51. Thus, I would arrive at a similar conclusion to that of Cooke J. in *W.A. (Democratic Republic of Congo) v. Minister for Justice Equality and Law Reform* [2012] IEHC 251 (followed by Clark J. in *N.N. (Cameroon) v. Minister for Justice* [2012] IEHC 499), if perhaps more by reliance on reg. 2(2) rather than on the need to resolve "*ambiguity*" by reference to EU law as referred to by Cooke J. at para. 33. Subject to that qualification, I would favour the conclusion thus arrived at to that proposed by Cross J. in *J.T.M. v. Minister for Justice Equality and Law Reform (No. 2)* [2012] IEHC 99, which itself was in line with the judgment of Hogan J. on the leave application in the same case, *J.T.M. v. Minister for Justice Equality and Law Reform (No. 1)* [2011] IEHC 393. Cross J. did not in fact take issue with the proposition that the meaning of a term in the directive should be followed in the regulations, and expressly cited reg. 2(2), which Cooke J. and Clark J. did not. Where he parted company from them was in finding that even the directive did not limit serious harm to that carried out by actors of serious harm (para. 31). However I would take the view that this approach, while of course correct in terms of literal interpretation, would not give quite as full effect to art. 6 of the directive as would the alternative conclusion proposed by Cooke J. Thus I would respectfully favour the latter conclusion to that expressed by Cross J. at para 34 that "*[s]erious harm means what is says, it is not to be confined only to harm carried out by actors of serious harm*". Serious harm in the directive, and therefore in the regulations, means serious harm carried out by actors of serious harm, which "*include*" the entities listed in art. 6. However it does not follow that an assertion by a decision-maker that it "only" arises from one of the listed actors of serious harm is fatal to a decision in the absence of elements which make it necessary or appropriate to have regard to acts of any other actor, a matter I will return to below.

Irrationality of conclusion regarding state protection

52. The decision regarding the availability of state protection was attacked from a number of angles, including irrationality, unfairness, and failure to state or apply the correct test. Mr. Lynn first argued that on reading the country of origin information provided, there was considerable evidence that the Cameroonian legal system was ineffective. I tend to agree that there was such evidence, but on the other hand, there was also some material on which the Minister could have drawn an alternative conclusion. On that basis, I would not hold that a decision that the Cameroonian legal system was effective within the meaning of the qualification directive, if such had been properly made, was irrational. However, that is separate from the question of whether the test had been properly understood and applied, with particular reference to the question of protection from NGOs.

Failure to state the correct test in relation to state protection

53. In the analysis regarding state protection, the Minister does not analyse the country of origin material in terms of the wording of the individual elements of the test as set out in art. 7.2 of the directive. That requires the State or the entity governing the territory concerned to, *inter alia,* operate an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection. Mr. Conlan Smyth has pointed to a number of passages in the decision which attempt to deal with these issues although without doing so expressly in terms of the precise words of the test. I would consider that a failure to state and analyse the express test is not fatal as long as it is clear that it was understood and considered in substance. In this case, the Minister does give it substantive consideration (again, leaving aside the question of whether protection by NGOs can be part of that test), although one would hope that the unduly loose and free-form decision in this case can be significantly improved upon in future. Best practice would involve a clear statement of the test and a decision, clearly stated, on each of its elements. I would not quash the decision simply by reason of failure to expressly state the test concerned.

Failure to give notice of state protection as an issue

54. Mr. Lynn argued that the applicant had not been notified of an amount of country of origin information that the decision maker relied on. He says that he did not realise that State protection would be an issue, seeing as, while it was an issue before the commissioner, it was not an issue before the tribunal.

55. There is no substance to this complaint, for reasons similar to those which I discussed in *B.W. (No. 2) v. Refugee Appeals Tribunal* [2015] IEHC 759. It is for an applicant to address the elements of his or her claim that arise as inherent aspects of the status being applied for (reg. 5(3) of the 2006 regulations).

Failure to give notice of country of origin information relied on
56. Mr. Lynn complains that the applicant did not get notice of country of origin information relied on. In relation to that issue, I have regard to the decision of Birmingham J. in *Ahmed v. Minister for Justice and Equality*, 24th March, 2011, in which he referred to the entitlement of the decision maker to obtain up to date country of origin information without having to specifically put that to an applicant.

57. There has been considerable debate as to the precise impact of fair procedures in the context of subsidiary protection, in a system such as that at issue here where subsidiary protection is decided independently of refugee status. In his opinion in Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform*, 26th April, 2012 at para. 117, Advocate General Bot was of the view that the decision maker was not required to notify the applicant of "*elements*" of the proposed decision. In the actual judgment of the however, this had changed to a principle that the decision maker was not required to notify the applicant of "*arguments*". It seems therefore that it is certainly open to consideration as to whether a decision maker must furnish "*evidence*" to an applicant, if it intends to take that into account.

58. In my view, the *Ahmed* approach applies if the Minister (or indeed in an analogous situation, the tribunal or commissioner) is relying on well-known, objective and publicly accessible country of origin information, such as the country reports from the United States State Department, or country information from the United Kingdom Home Office. There may be other categories of such universally recognised information but it is not necessary to identify them for the purposes of the present judgment. If a decision maker is going to consult more obscure sources of country of origin information, it is arguable that an obligation to disclose that in advance to the applicant could arise unless as such other sources simply confirm or broadly corroborate what is said in the major publicly available sources.

59. In the present case, I do not think that the sources consulted painted a significantly different picture from the picture as set out in the U.S. State Department Report and U.K. Home Office material. Therefore, no complaint of breach of fair procedures can be sustained under this heading.

Failure to consider compelling reasons arising out of the previous serious harm
60. Mr. Lynn argues that there was no consideration given to the rider to reg. 5(2), that "*compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection*."

61. However, for the reasons more particularly set out in my judgment in *S.I. v. Refugee Appeals Tribunal*, given today (15th February, 2016), the duty to consider this rider only arises in the subsidiary protection context if there is a finding that the applicant has already suffered serious harm within the meaning of the 2006 regulations and the qualification directive. As there is no such finding, the argument cannot succeed.

Finding that serious harm can "only" arise from one of the named actors of serious harm
62. The Minister states that persecution or serious harm can "*only*" arise from the actors of persecution or serious harm referred to in the directive. This is strictly correct as referred to above although both the regulations and the directive provide that the actors of persecution or serious harm merely "*include*" the entities listed. Serious harm must arise from actors of serious harm, but in special circumstances those actors may include entities going beyond the entities listed in art. 6.

63. However, as discussed in *S.I.*, while the definition of "actors of persecution" is expressed to be inclusive of the categories specified, those categories include all state actors and all non-state actors that meet the condition that the state is not providing effective protection. Therefore there are only a limited number of other actors that could be included (e.g., intervening states acting within the territory of the state concerned) unless the condition applying to non-state actors was to be set aside. This would seem to me to do violence to the purpose of the qualification directive. There are no special circumstances here requiring the Minister to consider actors going beyond the entities listed in art. 6. It follows that the only inaccuracy here is that the Minister should have stated that serious harm can *normally* only emanate from one of the listed entities, and there is no reason to go beyond that list in this case. Insofar as this is an error, it is not fatal to the decision.

Requirement to identify a particular part of the country for internal relocation
64. As I held in *M.N. v. Refugee Appeals Tribunal* [2015] IEHC 831, in considering internal relocation, a particular part of the country of origin needs to be identified to comply with reg. 7 of the regulations and art. 8 of the directive.

65. This includes identifying a particular part of the country in which a risk of serious harm would not arise. This was not done in the present case, which is of particular significance giving that Cameroon is linguistically divided. The applicant is English-speaking and presumably could not be expected to live otherwise than in the Anglophone part of country.

66. Mr. Conlan Smyth submits that this is that the discussion on this subject in the decision is not an internal relocation finding at all and therefore art. 8 is not applicable. The discussion is simply relevant to whether there are substantial grounds for believing that there would be a real risk of serious harm. For the reasons set out in *M.N.*, I do not accept this submission. If internal relocation is to be considered at all, it must be considered in accordance with reg. 7 and art. 8, otherwise the objectives of the qualification directive would be undermined.

67. However, the defective finding in relation to internal relocation is not necessarily essential to the decision because the core of the decision was that there was no risk of serious harm. If this decision is valid, then internal relocation does not matter and the discussion on it can be severed. The real question in the case therefore comes down to whether the finding of no risk of serious harm was valid having regard to the final issue which I now discuss.

Decision regarding state protection took into account protection by NGOs
68. The structure of the directive is such that it provides a remedy at the subsidiary protection stage in relation to "*serious harm*", which in turn must have been carried out by one of the "*actors of serious harm*". In relation to non-state actors, these persons (normally) only count as such actors if the state (or organisations standing in the position of the state) is unable or unwilling to provide protection. Thus the question of state protection is part of the test for protection, and not a separate ground for refusing protection to someone who faces a risk of serious harm. If the state can provide protection, then there is no actor of serious harm and therefore no serious harm (this is the essential gist of the decision of the Minister in this case at p. 7 of 8). Thus, state protection, where it arises, and risk of serious harm cannot be severed, and indeed they are intertwined in the terms of the decision

here.

69. Considerable account was taken by the Minister of protection available from non-governmental organisations. This matter falls outside the definition of actors of protection in art. 7(1) of the directive, at least in the absence of evidence that the state was responsible for the framework within which NGOs provided such protection (for example, by funding them to do so).

70. While actors of protection may include international organisations (*Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 Abdullah v. Bundesrepublik Deutschland* (CJEU 2nd March 2010) paras. 74-75), they do not include national non-governmental organisations.

71. The discussion of protection from NGOs is a flaw in the decision as it demonstrates a misunderstanding as to the test to be applied.

72. In view of the terms of the directive as applied to a case such as this, it is not possible to sever findings of lack of serious harm from findings of state protection because the latter are part of the test for the former. The whole decision therefore must be quashed.

Order

73. For the foregoing reasons I will order:-

(i) that leave be granted to seek judicial review in accordance with the latest amended statement.

(ii) that an order of *certiorari* do issue removing for the purpose of being quashed the decision of the Minister of 30th November, 2011 refusing to grant subsidiary protection to the applicant.

(iii) that the Minister be directed to reconsider and decide on the applicant's application for subsidiary protection in accordance with the judgment of the court.

(iv) that the matter be adjourned to allow the parties to consider any consequential applications that may arise, subject to giving advance notice to the other party of any such intended application.