THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 201 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996, (AS AMENDED), AND

IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED), AND

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

N. A. T

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered the 20th day of July , 2012

Background

1. The applicant is a national of Ghana born on 7th January, 1992. Her mother left home when the applicant was a baby and she has had no contact with her since. Following her father's death in 2006, she went to live with her uncle. She claims that her uncle sold her to a "fetish priest" who was also a polygamist. She alleged that she was taken against her will to this priest on 1st January, 2008. She further alleged that on 9th February, 2008, she was raped by this man following which her friend's father came to her assistance. He attempted to obtain the assistance of the police who refused to get involved. He then organised the applicant's flight from Ghana. She was brought to Ireland by this man via Italy on 25th February, 2008.

2. The applicant formally applied for asylum as an unaccompanied minor on 2nd April, 2008. She filled out the usual ORAC questionnaire and s. 11 interviews were conducted with her on 15th May, 2008, and 4th June, 2008. On 9th July, 2008, the applicant was informed that ORAC was recommending that she should not be declared a refugee and furnished her with a report pursuant to s. 13(1) of the Refugee Act 1996 (as amended) with the notification. An appeal was lodged against this decision and following an oral hearing before the Refugee Appeals Tribunal, the applicant was informed by letter dated 29th May, 2009, that the recommendation of ORAC that she should not be declared a refugee had been affirmed. A copy of the decision was enclosed with the notification.

3. The decision of the Minister for Justice and Equality refusing the applicant a grant of refugee status was made under s. 17(1) of the Refugee Act 1996, and was notified to the applicant on 22nd June, 2009. This letter also outlined the Minister's proposal to make a deportation order in respect of the applicant and her rights to apply for subsidiary protection and leave to remain and the manner and order in which any such applications would be considered.

4. An application for subsidiary protection was made to the Minister for Justice and Equality by letter dated 13th July, 2009 under the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006), and in a letter of the same date representations were made to the Minister for leave to remain temporarily in the state under s. 3 of the Immigration Act 1999.

5. The application for subsidiary protection was refused by the Minister and notified to the applicant by letter dated 26th January, 2012. A copy of the report setting out the Minister's determination was enclosed with the letter of notification.

Procedural History

6. The applicant originally sought leave to apply for judicial review by way of *certiorari* seeking orders quashing the decision of the Refugee Appeals Tribunal (RAT) affirming the decision of the Refugee Applications Commissioner dated 22nd June, 2009 and the Minister's decision refusing the applicant refugee status consequent thereon pursuant to s. 17 of the Refugee Act 1996. A declaration was also sought that s. 3(1) of the Immigration Act 1999 (as amended) was inconsistent with the provisions of Bunreacht na hÉireann and that the declarations of the time limits provided by s. 5 of the Illegal Immigrants (Trafficking) Act 2000 and/or O. 84 of the Rules of the Superior Courts were not in compliance with the principles of equivalence or effectiveness. In addition, orders of *certiorari* were sought quashing the Minister's decision to make a deportation order in respect of the applicant notified to her on 27th February, 2012. An order was also sought quashing the Minister's decision refusing the applicant's application for subsidiary protection of 26th January, 2012. The hearing proceeded by way of a telescoped hearing.

7. The matter was first heard on 20th November, 2012 at which stage it was indicated to the court that the only reliefs being pursued at that stage were the orders quashing the decision to make a deportation order and the decision refusing the applicant subsidiary protection.

8. The grounds upon which these decisions were challenged were then limited by the applicant to parts of ground 5 and grounds 8, 9 and 10.

9. Ground 5 challenged the subsidiary protection decision on the basis that the Minister's reliance on the RAT decision was misguided and the finding in respect of State protection was made without any assessment of the effectiveness of that protection in practical terms. Insofar as the decision was based on country of origin reports the decision was said to be irrational.

10. Grounds 8 and 9 were directed towards the lawfulness of the deportation order and challenged it as disproportionately interfering with the applicant's right of access to the courts and an effective remedy under the Constitution or the European Convention on Human Rights and under the Procedures Directive or the Charter of Fundamental Rights and Freedoms. Ground 9 claimed that the enforcement of the order in light of her particular circumstances disproportionately interfered with her personal rights to private life under the Constitution and/or the European Convention on Human Rights. Ground 10 concerned issues concerning the extension of time that might be required in relation to the challenge to the RAT decision.

11. In written submissions dated 8th November, 2012 the applicant sought to argue that the decision in respect of subsidiary

protection was fundamentally flawed on the grounds that the applicant was not afforded an opportunity to make submissions on the initial findings of the Minister. The issues raised in this point were at that time said to be the subject of a reference to the CJEU in Case C-277/11 *M.M. v. Minister for Justice, Equality and Law Reform* in respect of which judgment was then awaited.

12. In addition, at that time in parallel but unrelated proceedings Clark J. had granted leave to apply for judicial review on a wide range of grounds involving a broad challenge to the subsidiary protection scheme as it then applied in Ireland and in respect of which a reserved judgment was delivered on 12th October, 2012 in *J.C.M.* (DRC) and *M.L.* (DRC) v. The Minister for Justice and Equality, The Attorney General and Ireland [2012] IEHC 485. Leave was granted to the applicants in those cases to apply for orders of certiorari in respect of decisions made refusing them subsidiary protection on the grounds that:-

> "The procedures applied by the Minister with regard to subsidiary protection are unfair and in breach of natural and constitutional justice and *ultra vires* Council Directive 2004/83/EC and in breach of general principles of the law of the Union in that:
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> (1) The applicant is told of his right to apply for subsidiary protection after being told that his right to remain in the State has expired;
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> (2) The applicant potentially carries findings of a lack of credibility with him from the asylum process thereby creating a negative impression from the outset;
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> (3) The applicant cannot bring a claim unless he has been informed by the Minister that he is a failed asylum seeker. The decision to refuse a declaration of refugee status implies that the Minister has already given some consideration to the case and has made a negative determination in relation to the applicant's case. This creates an impression of partiality on the part of the Minister whose officials will also consider the subsidiary protection application;
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> (4) An application for subsidiary protection is considered during the pre-deportation process, when the Minister has already formed an intention to consider making a deportation order;
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> (5) The competence, knowledge and training of the civil servant assessing eligibility for the subsidiary protection, a complex legal issue, is not regulated; and
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> (6) In contrast with asylum applications, subsidiary protection applications are not considered by a person who is independent of the Minister and the performance of his functions."

13. In other related proceedings *V.J. (Moldova) v. The Minister for Justice, Equality and Law Reform* [2012] IEHC 337, Cooke J. granted leave to apply for judicial review of the Minister's refusal of an application for subsidiary protection on the ground that:-

> "By confining the right to apply for subsidiary protection to the circumstance in which the asylum seeker's entitlement to remain lawfully in the State pursuant to s. 9(2) of the Refugee Act 1996, has expired and a decision has been taken to propose the deportation of the applicant under s. 3(3) of the Immigration Act 1999, Regulation 4(1) of the 2006 Regulations in conjunction with s. 3 of the said Act of 1999, has the effect of imposing a precondition or disadvantage upon a subsidiary protection applicant which is *ultra vires* Council Directive 2004/83/EC of the 29th April, 2004, and is incompatible with general principles of European Union law."

14. In the applicant's legal submissions in this case, though it was acknowledged that there was a pleading deficiency and that leave to apply for judicial review of the decision had not been sought on the grounds set out in the cases set out above it was submitted that a number of imminent decisions from the CJEU, and the Superior Courts addressed serious issues concerning the operation of the subsidiary protection regime in Ireland. In addition, the court had been informed when a date for hearing was being set on 16th July, 2012 of the possibility that some or all of these matters might remain undetermined at the time of this leave hearing and it was submitted that it was appropriate to grant leave to the applicant to amend the grounds of her application. The court was satisfied to do so having heard legal submissions on the matter from both sides. An amended statement of grounds was delivered on the 27th November, 2012. At para. 12 the applicant sets out the additional grounds upon which relief was sought which are the same as those set out in the judgment of Clark J. at (1) to (6) quoted above.

15. It was accepted at the time of the application for leave to apply on the amended grounds that in respect of the original application no issue as to time arose. However, the court extended the time for the bringing of the application insofar as that was necessary in regard to the new grounds advanced because of the extensive challenge then underway in *M.L.*, *J.C.M.* and *V.J.* and the case of *M.M.* and the legal uncertainty thereby created. In addition, the court was satisfied that the nature of the relief sought was substantially the same as that already sought in the initial application namely, the quashing of the subsidiary protection decision.

16. On 20th June, 2017, this court considered the application for judicial review in *M.L.*, *J.C.M* and *V.J.* In *M.L.* and *J.C.M.* , the court declined to grant relief based on grounds 1, 3, 4, 5 and 6 for the reasons set out in the judgment [2017] IEHC 570. A significant part of the challenge to the subsidiary protection decision in the present application is on exactly the same legal grounds and accordingly, to that extent is governed by the court's findings in *M.L.* and *J.C.M.* The submissions in respect of the relief claimed are identical. Accordingly, I am satisfied that the court should refuse the relief claimed based upon the same grounds in this case for the same reasons.

17. However, in *M.L.* and *J.C.M.* and *V.J.*, this Court granted relief to *M.L.* and *J.C.M.* on Ground 2 namely:-

> "(2) The applicant potentially carries findings of a lack of credibility with him from the asylum process thereby creating a negative impression from the outset."

The court also granted relief on an additional ground which was added to the above stated Grounds (1) to (6) in *M.L.*,J.C.M and *V.J.*, by leave of the court namely:-

> "The failure of the respondents to provide an oral hearing to the applicant for subsidiary protection in circumstances where such a hearing is available to an applicant for asylum is in breach of the fundamental principles of EU law and *ultra vires* Directive 2004/83/EU."

No application was made to amend the amended grounds to include the latter ground in this case. Therefore, the sole ground to be considered by the court in this case is the remaining ground (2) already quoted and the original related ground 5. It was

acknowledged during the hearing of the case that any relief claimed in respect of the deportation order was dependent on a successful challenge to the subsidiary protection decision.

18. It should be noted that the issues raised in these two points were considered in two judgments of the CJEU following references made by the High and Supreme Courts. Initially in Case C-277/11 *M.M. v. Minister for Justice, Equality and Law Reform* (22nd November, 2012) the CJEU was asked by the High Court (Hogan J.) for a preliminary ruling on the following question:-

> "In a case where an applicant seeks subsidiary protection status following a refusal to grant refugee status and it is proposed that such an application should be refused, does the requirement to cooperate with an applicant imposed on a Member State in Article 4(1) of … Directive 2004/83 … require the administrative authorities of the Member State in question to supply such applicant with the results of such an assessment before a decision is finally made so as to enable him or her to address those aspects of the proposed decision which suggest a negative result?"

The CJEU determined that no such requirement arose. However, the court further considered the question which it held was raised more generally in the course of the proceedings concerning "the right of a foreign national to be heard in the course of examination of his second application (for subsidiary protection) when that application is made following rejection of an initial application (which sought refugee status)". It considered whether, in a bi-furcated system for examining asylum and subsidiary protection applications, it is unlawful under EU law not to hold a further hearing in the course of the examination of the second application and prior to refusal thereof on the grounds that the applicant has already been heard during the procedure relating to the first application for refugee status. The right to be heard was considered by the court at paras. 81 to 94 of the judgment. It held that in a bi-furcated system for the processing of asylum and subsidiary protection applications separately one after the another, it was for the national court to ensure observance in each of those procedures of the applicant's fundamental rights and more particularly of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested.

> "In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection."

In particular, it stated:-

> "91. Rather, when a Member State has chosen to establish two separate procedures, one following upon the other, for examining asylum applications and applications for subsidiary protection, it is important that the applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures.
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> 92. Furthermore, that interpretation is all the more justified in a situation such as that of the case in the main proceedings since, according to the information provided by the referring court itself, the competent national authority, when stating the grounds for its decision to reject the application for subsidiary protection, referred to a large extent to the reasons it had already relied on in support of its rejection of the asylum application, although, under Directive 2004/83, the conditions which must be fulfilled for the grant of refugee status and for the awarding of subsidiary protection status are different, as is the nature of the rights attaching to each of them. …"

19. When these proceedings returned to the High Court to determine the effect of the preliminary ruling Hogan J. addressed its implications for the standard of fair procedures applicable to subsidiary protection applications : ([2013] 1 I.R. 370). In *M.M.* the RAT rejected the applicant's claim for refugee status on general credibility grounds holding that it was difficult to believe aspects of his story. These conclusions were never challenged in judicial review proceedings. Hogan J. having considered paras. 81 to 94 of the CJEU ruling stated:-

> "The European Court of Justice was, however, evidently troubled by the aspects of the procedure actually followed in this case, so much so that it went out of its way to give guidance to this Court on this very question. The judgment specifically emphasises the fact that the asylum and subsidiary protection procedures presently contained in Irish law are distinct and different. The logical corollary of this is that under our bifurcated system the subsidiary protection application must be considered distinctly and separately from the asylum application. This in turn means that the Minister must decide the subsidiary protection issue without any reliance on the prior reasoning contained in the asylum application insofar as this otherwise may be taken effectively to preclude an applicant for subsidiary protection re-opening certain issues at that stage or inasmuch as it creates any *quasi* estoppel arising as against such an applicant by reason of a failure to challenge an adverse asylum application in separate judicial review proceedings, at least in the absence of an effective hearing where the applicant was given an opportunity afresh to revisit these issues; where these matters were expressly put to the applicant by the decision maker and where the decision maker independently made a fresh decision on the applicant's credibility and other relevant issues.
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> 32. The conclusion is underscored by the European Court of Justice's express reference (at para. 92 of the judgment) - with evident disapproval - to the fact that the Minister had relied on the adverse credibility findings made in the asylum application as a ground for rejecting the subsidiary protection application. …"

20. The learned judge then considered a number of decisions of the High Court on this issue and stated:-

> "37. … It seems to me nevertheless that this reasoning must, however, be now regarded as having been superseded by the judgment of the Court of Justice in this case, precisely because that court commenced the analysis contained in the second part of the judgment from an entirely different perspective, namely that in a bifurcated system such as ours subsidiary protection must be evaluated separately and distinctly from the determination on the asylum application. …
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> 46. In these circumstances, in the light of the guidance given by the European Court of Justice on the reference, I must hold that the Minister failed to afford the applicant an effective hearing at subsidiary protection stage, precisely because he relied completely on the adverse credibility findings which had been made by the Tribunal in respect of the contention that Mr. M. would come to harm if he were returned to Rwanda by reason of his involvement in the office of military prosecutor and because he made no independent and separate adjudication on these claims.
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> 47. In order for the hearing before the Minister to be effective in the sense understood by the European Court of Justice in such circumstances, such a hearing would, at a minimum, involve a procedure whereby (i) the applicant was invited to comment on any adverse credibility findings made by the Refugee Appeals Tribunal; (ii) the applicant was given a

completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection and (iii) involve a completely fresh assessment of the applicant's credibility in circumstances where the mere fact that the Tribunal had ruled adversely to this question would not in itself suffice and would not even be directly relevant to this fresh credibility assessment.

48. It is unnecessary at this juncture to consider the question of whether a separate oral hearing would ever generally be required at subsidiary protection stage. It probably suffices to say that there might well be many circumstances where such a hearing would be required if a credibility finding averse to the applicant was to be made which was separate and distinct from that made during the asylum process …"

This decision was appealed to the Supreme Court.

21. In the course of that appeal the Supreme Court made a further reference to the CJEU (Case C-560/14 *M. v. Minister for Justice and Equality* 9th February, 2017) and posed the question whether in European Union law an applicant for subsidiary protection must be accorded an oral hearing of his/her application including the right to call or cross-examine witnesses when the application is made in circumstances where the Member State concerned operates two separate procedures one after the another for examining applications for refugee status and for subsidiary protection. The CJEU determined that the right to be heard under Council Directive 2004/83 in respect of an application for refugee status or subsidiary protection did not require as a rule in a bifurcated system that the applicant have a right to an interview relating to his application and the right to call or cross-examine witnesses when that interview takes place. However, it stated that an interview must nonetheless be arranged where specific circumstances relating to the elements available to the competent authority or to the personal general circumstances in which the application for subsidiary protection has been made render it necessary in order to examine that application with full knowledge of the facts: however, this was a matter for the referring court to establish. It also stated that it did not follow from its earlier judgment that an interview must necessarily be arranged for an applicant under the procedure relating to the grant of subsidiary protection. It noted that it had stated merely that it rejected the submission that the fact that an applicant has already been heard in the course of an examination of an asylum application made it unnecessary to arrange a hearing when a subsequent application for subsidiary protection was being examined. However, it did not impose an obligation that an interview relating to the application for subsidiary protection must be arranged in all circumstances.

22. The CJEU considered the right to be heard guaranteed to an applicant for subsidiary protection as follows:-

"31. The right to be heard guarantees the applicant for subsidiary protection the opportunity to put forward effectively, in the course of the administrative procedure, his views regarding his application for subsidiary protection and grounds that may give the competent authority reason to refrain from adopting an unfavourable decision (see, by analogy, judgments of 11th December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, para. 54, and of 17th March 2016, *Bensada Benallal*, C-161/15, EU:C:2016:175, para. 33).

32. Moreover, the right to be heard must allow that authority to investigate the matter in such a way that it adopts a decision in full knowledge of the facts, while taking account of all relevant factors, and to state reasons for that decision adequately, so that, where appropriate, the applicant can exercise his right of appeal …

33. Furthermore, it is clear from the Court's case-law that the question whether there is an infringement of the right to be heard must be examined in relation, *inter alia*, to the legal rules governing the matter concerned (see, to that effect, judgment of 10th September 2013, *G.* and *R.*, C-383/13 PPU, EU:C:2013:533, para. 34 and the case-law cited).

34. It follows that the detailed rules under which applicants for subsidiary protection are to be able to exercise their right to be heard prior to the adoption of a final decision on their application must be assessed in the light of the provisions of Directive 2004/83, which are intended, *inter alia*, to lay down minimum standards relating to the conditions which third country nationals must satisfy in order to be entitled to subsidiary protection …

35. In order to take a decision on an application for subsidiary protection, the competent authority must establish whether the applicant satisfies the conditions laid down in Article 2(e) of Directive 2004/83, which involves, in particular, determining whether substantial grounds have been shown for believing that, if returned to his country of origin, he would face a real risk of suffering serious harm and whether he is unable, or, owing to such risk, unwilling, to avail himself of the protection of that country.

36. For that purpose, it is apparent from Article 4 of Directive 2004/83 that the elements which the competent authority must take into account include statements and documentation regarding the applicant's age, background, identity, nationality or nationalities, countries of previous residence, previous asylum applications, travel routes and reasons for applying and, more broadly, the serious harm to which he has been or may be subject. Where necessary, the competent authority must also take account of the explanation provided regarding a lack of relevant elements, and of the applicant's general credibility.

37. Therefore, the right to be heard before the adoption of a decision on an application for subsidiary protection must allow the applicant to set out his views on all those elements, in order to substantiate his application and to allow the authorities to carry out the individual assessment of the facts and circumstances that is provided for in Article 4 of Directive 2004/83 with full knowledge thereof, with a view to determining whether there would be a real risk of the applicant suffering serious harm, within the meaning of the directive, if he were returned to his country of origin.

38. That being so, the fact that an applicant for subsidiary protection has been able to set out his views only in written form cannot, generally, be regarded as not allowing effective observance of his right to be heard before a decision on his application is adopted."

23. The court was also satisfied that the elements described in para. 36 of the judgment could be effectively canvassed by means of written statements accompanied by documentary evidence. The procedural mechanism should be sufficiently flexible to allow an applicant to express his views and comment in detail on the elements to be taken into account by the competent authority and to set out as he thinks appropriate, any information or assessments different from those already submitted when his asylum application was examined. The court noted that the application for subsidiary protection took place following the asylum procedure assessment during which the applicant in *M.M.* was accorded an interview concerning his asylum application. It was satisfied that information gathered at that interview could also prove useful for assessing the merits of his application for subsidiary protection and his individual position and circumstances. The information and material gathered at the interview also contributed to the competent authority's ability to

determine the application with knowledge of the facts. It concluded that the right to be heard did not make it necessary for an applicant for subsidiary protection to be afforded a fresh interview in order to add new material to that already set out in writing absent "special circumstances [that] make it necessary for an interview to be arranged in order that the right of the applicant for subsidiary protection to be heard is effectively observed".

24. The nature of such "specific circumstances" was also considered and it was for the national court to determine whether they existed. The court added:-

> "49. Therefore, an interview must be arranged if the competent authority is not objectively in a position - on the basis of the elements available to it following the written procedure and the interview with the applicant conducted when his asylum application was examined - to determine with full knowledge of the facts whether substantial grounds have been shown for believing that, if returned to his country of origin, he would face a real risk of suffering serious harm, and whether he is unable, or, owing to such risk, unwilling, to avail himself of the protection of that country.
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> 50. In such a situation, an interview could in fact allow the competent authority to question the applicant regarding the elements which are lacking for the purpose of taking a decision on his application and, as the case may be, of establishing whether the conditions laid down in Article 4(5) of Directive 2004/83 are met.
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> 51. An interview must also be arranged if it is apparent - in the light of the personal or general circumstances in which the application for subsidiary protection has been made, in particular any specific vulnerability of the applicant, due for example to his age, his state of health or the fact that he has been subjected to serious forms of violence - that one is necessary in order to allow him to comment in full and coherently on the elements capable of substantiating that application."
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> The court also considered whether the applicant had a right to call or cross-examine witnesses at that interview and concluded that he/she did not. It stated:-
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> "54. In that regard it should be pointed out that such a right goes beyond the requirements which ordinarily arise from the right to be heard in administrative procedures … and, secondly that the rules applicable to the examination of applications for subsidiary protection, in particular those laid down in Article 4 … do not confer particular importance on testimony in order to assess the facts and the relevant circumstances.
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> 55. It follows that the right to be heard does not imply that an applicant for subsidiary protection has the right to call or cross-examine witnesses at any interview in the course of examination of his application."

25. Following the decision of the CJEU in relation to the point referred by the Supreme Court, the Supreme Court heard further argument and delivered its judgment in the matter on 14th February, 2018. O'Donnell J. in delivering the judgment of the court in *M.M. v. Minister for Justice and Equality and others* [2018] IESC 10 stated:-

> "25. It remains only to apply that ruling to determine this appeal. The court has received extensive argument, and a proliferation of materials. However, in my view the outcome of the case is clear and straightforward. The decision of the European Court of Justice makes it clear that in the Irish context which existed at the time of the decision here, and where the decision on subsidiary protection was a separate decision taken after the determination of the asylum process, it was permissible to make that decision on the basis of a written procedure, so long as the procedures adopted were sufficiently flexible to allow the applicant to make his case. That was plainly the case here. Exceptionally, it may be necessary to permit an oral interview. It cannot be contended here however that such an exceptional situation arose: the submission seeking subsidiary protection identified only those matters which had already been relied on in the claim for asylum. The decision of the ECJ also makes it clear that it is permissible to have regard to the information obtained in the asylum process, and the *assessment of the decision maker* (emphasis supplied). There is in this case no basis for contending for an oral hearing, still less for an adversarial hearing. It was argued, faintly, that Irish law might require more than that procedure, but at this stage of the proceedings that argument is in my view as forlorn as a matter of procedure, as it is of substance. The appeal must be allowed and the order of certiorari made by the High Court must be set aside, and the application for judicial review dismissed."

26. In my judgment in *M.L.*, *J.C.M.* and *V.J.*, I concluded on the basis of the judgment of the High Court in *M.M. v. Minister for Justice* (Hogan J.) that it was essential that each of the applicants be given an opportunity to address the adverse credibility findings made by the RAT which had been relied upon and quoted in the subsidiary protection decisions from the asylum decisions and that they should be accorded a fresh opportunity to revisit the matters bearing on their claims for subsidiary protection given the requirements that there be a separate and independent adjudication on each of these claims. I also noted that each of the subsidiary protection decisions relied heavily upon the determination made in each case by the Refugee Appeals Tribunal on the credibility of each applicant. I was satisfied that the applicants should have been invited to comment upon the adverse findings made by the Refugee Appeals Tribunal and that if such findings were to be relied upon to the extent evident in the subsidiary protection decisions consideration should have been given as to whether this gave rise to "specific circumstances" that would require each applicant to be interviewed in order to ensure that their rights to be heard were effectively observed. I was further satisfied that the simple adoption of findings of fact made by the RAT in applications for subsidiary protection in respect of the credibility of each of the applicants fell short of the fair procedures necessary in order to vindicate each applicant's right to be heard. However, I am satisfied having considered the Supreme Court judgment in *M.M.* which overturned the judgment of the High Court upon which I relied that I must determine this application in accordance with the approach set out at para. 25 of the Supreme Court's judgment. In that regard, it should be noted that the parties did not seek to make further submissions on the matter notwithstanding the intervening developments in the jurisprudence.

Conclusion

27. In the applicant's case an application was made for refugee status. ORAC recommended that she not be granted refugee status and she appealed to the RAT. An oral hearing was held. The applicant gave evidence. The Tribunal decision sets out in detail the evidence which was given by the applicant. The applicant's claim was based on the fact that she was born in Ghana and lived in a village with her father. Her mother had left when she was born; her father died in June 2006. After her father's death her uncle came to live with her in the family home. He stopped her going to school. She was allegedly beaten regularly by her uncle and made to sell water. On 1st January, 2008 she stated that her uncle took her to a fetish priest's home. He had five wives and lived in the village. She lived with his first wife and had to work on the farm. She said she was mistreated while living in his home. She claimed that she was raped by this priest on 9th February. She ran away to her friend's house and when a complaint was made to the police her friend's father was informed that this was a domestic matter and as the priest was powerful they could not do anything about it. Her

friend's father then bought her medicine and boarded a bus to a nearby town. On 15th February, 2008 she was informed by her friend's father that a group of people had come to his home and told him they would kill him if he did not give up the applicant. He was assaulted. On 24th February, the applicant states she went to Accra with her friend's father and he then brought her to Italy. She was not given any travel documents. Her friend's father held the documents. They arrived in Ireland on 25th February and boarded a bus. Her friend's father then put the applicant on a second bus and told her to alight at the offices of ORAC. A number of contradictions in the applicant's testimony and documentation submitted to the Tribunal in the course of the asylum application were put to the applicant during the course of the hearing which are set out at pp. 2 to 6 of the decision. The analysis of the applicant's claim is set out at pp. 20 to 23 of the RAT's decision.

28. In the "Determination" of the applicant's subsidiary protection decision the question addressed was whether substantial grounds had been shown for the applicant's belief that if returned to Ghana she would face a risk of "death penalty or execution", "torture or inhuman or degrading treatment or punishment" and "critically, whether protection is available to and accessible by the applicant". In considering an essential feature of the claim namely the applicant's fear of serious harm if returned to Ghana regarding a fetish priest and the people that work with him a report "Home Office UK Border Agency Country of Origin Information Report Ghana September 2010" was considered. While this country of origin information indicated that young girls in Southern Ghana were pledged to service at shrines it highlighted that the government had enacted a law against ritual servitude and criminalised the practice. In that regard the Determination quotes directly from the finding made in respect of the applicant's credibility in the RAT decision as follows:-

> "The applicant stated that Akwadum is small and that it was a village with one main street. The applicant also stated during the appeal hearing that many people in her area supported the shrine. When generally questioned by the Presenting Officer about the shrine and the name of the shrine in her village, the applicant stated that she did not really know anything about it and all that she knew was that he performed things when people came to him. When the Presenting Officer asked why she did not know more about the shrine, the applicant stated that she knew that there was a priest but she had not known that he used blood, feathers and eggs until she had gone to his home. Considering that the applicant's village was small, the length of the time the applicant lived in the village and the applicant's statements that she was considered married to the priest it would be reasonable to expect, even considering her age, that she would have more knowledge about this priest and the workings of the shrine and the applicant's vagueness in this regard calls into question the credibility of her account".

29. The applicant's allegation that she was raped by the fetish priest on 9th February, 2008 was also considered together with her claim that on 11th February accompanied by her friend's father she made a complaint to the police who did nothing to help her. The same Home Office report was considered in respect of the operation of the police and security forces in Ghana. It was concluded that the Ghanaian police had set up special units which dealt with police corruption and complaints from the public and that they had developed a five year plan within which to achieve a higher class of service for its citizens. It was concluded from the country of origin information that there was a police unit which specialised in dealing with the type of problems claimed to have been experienced by the applicant in Ghana. It was noted that there were mechanisms in place for an individual who was dissatisfied with any police investigation or protection offered to make a formal complaint. It was considered that the applicant could avail of State protection in Ghana if she needed it.

30. It was also submitted on behalf of the applicant that she was very young at the time of the alleged events and that their psychological impact upon her should be taken into account and a liberal application of the benefit of the doubt should therefore be applied in her case. The determination took into account the UN High Commissioner for Refugee Guidelines and International Protection No. 8: Child Asylum Claims (22nd December, 2009) which included the guideline that there may be exceptional cases in which the guidelines in respect of children under eighteen may be relevant even if the applicant has reached the age of eighteen years or slightly older. This may be particularly the case where persecution has hindered the applicant's development and her psychological maturity remains comparable to that of a child. A clear finding was made that this exceptional situation did not apply in the applicant's circumstances. It was noted that while living in Ireland she submitted documentation indicating that she attended two summer programmes with the City of Dublin Vocational Education Committee in 2008 and 2009. She enrolled in Mount Carmel secondary school and completed her leaving certificate in June 2011. In her transition year work she attended Claven Heaven nursing home as part of a social awareness course and a business studies course which led her to help raise money for charity. She had some journalistic experience from working on a school newsletter and was computer literate. She worked for the Ombudsman for Children and the St. Vincent's de Paul as part of her school transition in 2008. She attended the Vincentian Refugee Centre to practice English and learn how to use a computer. Her school reports were excellent showing her to be motivated, focused and hard working as a student. All representations made on her behalf provided a positive account of her character and describe a person who has demonstrated an innate capability of finding and obtaining help for herself and improving her own circumstances. It was concluded that this characteristic together with her experience, skills and education made her an independent and employable person if she were to return to Ghana. Indeed, there was nothing in the applicant's personal circumstances that would prevent her from seeking protection from the authorities in Ghana and its laws. Conclusions were reached that she had not demonstrated that she was without protection in Ghana or that there were grounds for believing that she would be at risk of serious harm if returned.

31. Two further extracts from the RAT decision in respect of the applicant's credibility were considered by the decision maker with particular regard to whether she was entitled to the "benefit of doubt" under Regulation 5(3) of the Directive. The first extract relied upon under this heading is the extract already quoted above under the heading of the assessment of facts and circumstances of her case under Regulation 5(1)(a). The second extract is as follows:-

> "The applicant states that after fleeing the shrine she went to a bus station with Z.'s father and they took a bus to Kwaberg. When asked if it was dangerous to travel in such a manner, the applicant stated that she was not told if it was dangerous but she had been afraid. The applicant states that many people in her village supported the shrine. She states that she escaped from the shrine without the fetish priest knowing that she had to go Kwaberg for safety... Considering that the applicant states that the fetish priest was powerful and was well supported in the village and the fact that the applicant's village was small, it is difficult to believe that Z.'s father and the applicant would have travelled openly on a bus to Kwaberg particularly after the applicant had fled from the fetish priest's shrine. Z.'s father appears to have wanted to assist and he went to great lengths so to do. According to the applicant Z.'s father did not tell her that she was going to Ireland nor did he tell her that she was to look for asylum. It is not credible considering her age, that he would bring her to a far off foreign country and leave her without any further contact or assistance."

It was therefore concluded because of the doubt surrounding her credibility that the applicant did not warrant the benefit of the doubt.

32. It is clear that the applicant's claim for subsidiary protection was based on the same facts as her application for asylum. It was permissible in making the decision in respect of subsidiary protection to do so on the basis of written procedure if the applicant was

permitted within that procedure to make her case. It is clear that a case was made by her and on her behalf relying upon materials previously submitted during the asylum process such as the psychological reports submitted on the asylum application and materials contained in the asylum file. In that context it is permissible following the determination of the CJEU as applied by the Supreme Court to have regard to the information obtained in the asylum process and "the assessment of the decision maker" in reaching that determination. This includes the finding made in respect of credibility which were referenced and quoted in the determination on subsidiary protection. No special circumstances were advanced to the decision maker or to this Court as to why an interview ought to have been conducted with the applicant prior to the determination made. The submission initially made on behalf of the applicant when seeking subsidiary protection relied on the same facts concerning her personal history, age and psychological profile together with similar country of origin information as were relied upon in the asylum process apart from some updating of that information. It has not been submitted and I am not satisfied that the decision maker was not objectively in a position on the basis of the material available following the written procedure and interview during the asylum process and in considering the further materials set out in the determination to determine the case with full knowledge of the facts. Consequently, I am not satisfied that special or exceptional circumstances existed which required a further which interview to be conducted have been established in this case either in the application or in the course of these proceedings. Accordingly, having considered all of the evidence and submissions made, I am not satisfied that the remaining ground (2) or the original ground 5 reach the required threshold upon which to grant leave to seek an order of certiorari of the decision made to refuse the applicant subsidiary protection or even if leave were granted to grant the substantive relief claimed

33. The applicant on the basis of the papers submitted to the court is a young woman of considerable talent who has made great use of the facilities available to her since she arrived in Ireland and availed of every opportunity in terms of her education and engaging with the community. In doing so she has made a positive contribution to others and an impression on those with whom she has worked whether in school or helping out in the community as evidenced by the testimonials considered on her behalf in the course of the applications for leave to remain and subsidiary protection. However, for the reasons set out above I am obliged to refuse this application.