THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 644 JR]

BETWEEN

S.J.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL

IRELAND

RESPONDENTS

JUDGMENT of Mr Justice David Keane delivered on the 10th October 2017.

Introduction

1. This is the judicial review of a decision by the Minister for Justice and Equality ('the Minister'), dated 30 September 2015 ('the decision'), to uphold a decision of 1 May of that year to refuse the applicant, a person already refused a declaration that she is entitled to subsidiary protection, the consent statutorily necessary to enable her to make a second application for such a declaration.

2. The central question it presents is whether an applicant for international protection, who seeks to rely on the credibility of the same statement (or statements) for the purposes of both a refugee status application under the Refugee Status Act 1996, as amended ('the 1996 Act'), and a subsidiary protection application under the European Communities (Eligibility for Protection) Regulations 2006 ('the 2006 Protection Regulations'), has an unqualified entitlement to have the same credibility issue assessed twice completely separately, once in the course of each procedure.

Background

3. The applicant is a national of Georgia. She arrived in the State on 14 December 2006 and applied for asylum four days later.4. On 23 March 2007, the Office of the Refugee Applications Commissioner ('the Commissioner') recommended that the applicant be refused refugee status on the basis that it was not evident that she had suffered persecution in Georgia related to a convention ground, or that she would suffer persecution if returned to that country. That decision was communicated to the applicant on 27 March 2007.

5. The applicant appealed to the Refugee Appeals Tribunal ('the RAT'), now the International Protection Appeals Tribunal ('the IPAT'). In a decision dated 19 September 2007, the RAT affirmed the recommendation of the Commissioner.

6. Although the relevant materials have not been exhibited, it appears that, on or about 20 November 2007, the applicant applied for a declaration of entitlement to subsidiary protection and leave to remain in the State. The Minister refused that application in a decision given on or about the 31 January 2011 or 1 February 2011. The applicant did not challenge that decision.

7. The Minister made a deportation order against the applicant on 7 February 2011. By letter dated 19 November 2013, the applicant's solicitor sought the revocation of that order and the reconsideration of the applicant's claim for subsidiary protection. The applicant's solicitor wrote again on 8 May 2014, making further submissions in support of that request. But, on 8 September 2014, the applicant was arrested and detained on foot of the deportation order, prompting the issue of legal proceedings on her behalf later that same day. I have not had sight of the papers in those proceedings, which I have been told were compromised between the parties and struck out on 22 February 2015.

8. It seems that, as a term of that compromise, the Minister agreed to consider the letter of 19 November 2013 as an application for the Minister's consent to a further (second) application for subsidiary protection by the applicant, pursuant to the provisions of s. 17, subs. (7) to (7H) of the 1996 Act, as amended by the European Communities (Asylum Procedures) Regulations 2011 and the European Union (Subsidiary Protection) Regulations 2013.

9. On 2 April 2015, the applicant's solicitor wrote to the Minister making additional submissions in support of that application.

10. Under cover of a letter dated 14 May 2015, the applicant received a copy of a recommendation dated 1 May 2015, adopted on behalf of the Minister on 14 May 2015, that the Minister's consent to a second application for subsidiary protection be refused. The cover letter informed the applicant of her entitlement to request a review of that decision. By letter dated 1 September 2015, the applicant's solicitor made such a request, together with a further submission in support of it.

11. In a review dated 30 September 2015, a deciding officer on the Minister's behalf upheld the decision to refuse the Minister's consent to a second application for subsidiary protection. That is the decision now under challenge. The applicant received notification of it on 7 October 2015.

Procedural history

12. The application is based on a statement of grounds dated 18 November 2015, grounded on an affidavit sworn by the applicant on the same date.

13. On 19 November 2015, the applicant sought ex parte, and was granted, an interim injunction restraining her deportation from the State.

14. On 15 February 2016, the applicant sought and obtained, ex parte, an Order granting her both leave to seek judicial review of the Minister's decision and an extension of time to that date for that purpose. The Order also granted the applicant leave to amend her statement of grounds in terms that it recites were scheduled to it. But the copy of the Order produced at the hearing contains no schedule. An amended statement of grounds was delivered the following day. While the amendments it contains are not marked, they

can be discerned from a comparison of the two documents.

15. The Order of 15 February 2016 also continued, for a specified period, the interim injunction restraining the applicant's deportation. Whether that injunction has continued in force since then, as the applicant suggests, or has been replaced by the Minister's undertaking not to enforce the deportation order pending the resolution of these proceedings, as the Minister asserts, is not clear from the papers furnished to the Court. Fortunately, nothing turns on the point for present purposes.

16. The Minister delivered a statement of opposition dated 7 November 2016. It is accompanied by an affidavit of verification, sworn on 4 November 2016 by a higher executive officer in the Ministerial Decisions Unit of the Department of Justice. The substance of that affidavit is limited to a description of the administrative process by which applications for the Minister's consent under s. 17 (7) of the 1996 Act, as amended, are generally considered.

The grounds of challenge
17. On three separate grounds, the applicant impugns the decision challenged as one captured by the test for unreasonableness, most recently restated by the Supreme Court in *Meadows v Minister for Justice* [2010] 2 IR 701.

18. The first is that it was irrational or unreasonable of the Minister to conclude that that the original decision to refuse consent to a further application for subsidiary protection had been reached in compliance with the requirements of s. 17 of the 1996 Act, as amended, or that it was a reasoned or lawful one.

19. The second ground is that the Minister applied the wrong test both in making the original decision to refuse consent and in reviewing that decision, by having regard to the provisions of s. 17 of the 1996 Act, as amended, and, in particular, the requirements of s. 17 (7E), thereby disregarding an undertaking that the Minister had given to the applicant as part of the compromise of the earlier judicial review proceedings to consider her application under s. 17 on some other, agreed basis.

20. The third ground is that, as part of the review, the Minister wrongly placed reliance on the adverse finding of the RAT concerning the credibility of the evidence given by the applicant in support of her refugee status application.

The arguments
21. The applicant's central argument can be shortly summarised in three propositions.

22. The first is that the Minister failed to afford the applicant an effective hearing at the subsidiary protection stage of the international protection process, because the Minister relied completely on the adverse credibility findings of the RAT and made no independent and separate adjudication on the applicant's credibility before the adoption of a decision refusing the protection requested, contrary to the applicant's right to be heard and, more specifically, the applicant's right to make known her views, as the scope of those rights was identified by the Court of Justice of the European Union ('CJEU') in *M.M. v Minister for Justice Case* C-277/11 (ECLI:EU:C:2012:744) (22 November 2012) (at para. 95) and subsequently applied by this Court (per Hogan J) in *M.M. v Minister for Justice (No. 3)* [2013] 1 IR 370 (23 January 2013) (at 391).

23. The second proposition is that the alleged infirmity just described is fatal not only to the Minister's decision to refuse the applicant a declaration of entitlement to subsidiary protection, which refusal the applicant did not challenge, but also, by a domino effect, to the Minister's subsequent decisions to refuse to revoke the deportation order against the applicant and, later, to refuse consent to a further application for subsidiary protection. The applicant has challenged each of the latter decisions in successive applications for judicial review. The first application was struck out on the Minister's agreement to consider an application for consent to a further application for subsidiary protection; the second is the one now before the Court.

24. The third proposition is that the Minister's decision to refuse consent to a further application for subsidiary protection is disproportionate or unreasonable, or both, in that it fails to acknowledge that the decision of the CJEU and, subsequently, that of this Court in MM represent a development in both domestic and European Union jurisprudence that amounts to a material change in the relevant and applicable legal framework, which in turn comprises a new element or finding that the applicant, through no fault of her own, could not present for the purposes of her original application for a declaration of entitlement to subsidiary protection, but which makes it significantly more likely that the applicant is entitled to that declaration.

The law
i) The test for re-admission to the international protection process

25. Section 17 of the 1996 Act – the statute applicable at the material time - prevents a person from making a second or subsequent application for international protection without the consent of the Minister.

26. Section 17 (7E) of the 1996 Act, as amended, provides that the Minister shall consent to the making of a subsequent application for a subsidiary protection declaration where he or she is satisfied that-

(a) Since the issue of the notice of refusal of a declaration, new elements or findings have arisen or have been presented by the person concerned which make it significantly more likely that the person will qualify for protection in the State, and

(b) the person was, through no fault of his or her own, incapable of presenting those elements or findings for the purposes of the previous application for a declaration of entitlement to subsidiary protection.

27. These requirements reflect those contained in Article 32 of *Council Directive 2005/85/EC on minimum standards and procedures in Member States for granting and withdrawing refugee status* ('the Procedures Directive'). Article 34, paragraph 2 of the Procedures Directive provides:

> 'Member States may lay down in national law rules on the preliminary examination pursuant to Article 32. Those rules may, inter alia:
>
> *(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;*
>
> *(b) require submission of the new information concerned within a time-limit after he/she obtained such information;*
>
> *(c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.*

The conditions shall not render impossible the access of applicant for asylum to a new procedure or result in the effective annulment or severe curtailment of such access.'

(ii) The assessment of credibility under the legal framework for international protection

28. In *V.Z. v Minister for Justice* [2002] 2 I.R. 135 (at 145) , the Supreme Court (per McGuinness J., Keane C.J., Denham, Murphy and Murray JJ. concurring) noted the use by the High Court in the decision then under appeal of the United Nations Handbook on Procedures and Criteria for Determining Refugee Status ("the UN Handbook") as an aid to the interpretation of the United Nations Convention relating to the Status of Refugees 1951 ("the Geneva Convention") (at 145). The Supreme Court endorsed that approach as correct (at 148).

29. In Part Two of the UN Handbook, which deals with 'Procedures for the Determination of Refugee Status, in the section on 'Establishing the Facts' under the heading 'Principles and methods', it states:

> '195. The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.'
>
> 196. It is a general legal principle that the burden of proof lies with the person submitting a claim. Often however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary be given the benefit of the doubt.'

30. Later, under the heading 'Benefit of the doubt', it continues:

> '203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.
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> 204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.'

31. I pause here to state the obvious; that the criteria by reference to which an entitlement to refugee status must be considered are not the same as those which govern the entitlement to subsidiary protection.

32. As the Geneva Convention provides, and as *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection and content of the protection granted* ('the Qualification Directive') acknowledges, a 'refugee' is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her habitual residence, is unable or, owing to such fear, is unwilling to return to it. That definition was enshrined in the domestic law of the State by s. 2 of the 1996 Act.

33. Section 11B of the 1996 Act, as inserted by s. 7(f) of the Immigration Act 2003, requires both the Refugee Applications Commissioner ('the Commissioner') and, where appropriate, the RAT (now the IPAT) to have regard to various specifically identified matters in assessing the credibility of an applicant for refugee status. Those matters include whether a reasonable explanation has been provided, where relevant, for: the absence of identity documents; the claim that the State is the first safe country the applicant has reached; any failure by the applicant to apply at the frontiers of the State; the forgery, destruction or disposal of any identity or other relevant documents by the applicant; any reliance by the applicant upon false evidence or false representations in support of the application; the making of a subsequent application after an earlier application has been withdrawn; the making of an application only following notification of a proposal to deport the applicant; any failure by the applicant to co-operate with the investigation of his or her application; any departure by the applicant from the State without the consent of the Minister; any failure by the applicant to inform the Commissioner of his or her address or of any change of address; or any failure by the applicant to comply with any reporting or residence requirement imposed by an immigration officer by notice in writing. It is also statutorily required, in assessing credibility, to have regard to whether the applicant has provided a full and true explanation of how he or she travelled to, and arrived in, the State.

34. Quite separately, Article 2 of the Qualification Directive establishes that a 'person eligible for subsidiary protection' means a third country national or stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

35. Article 15 of the Qualification Directive provides that, in relation to qualification for subsidiary protection, 'serious harm' consists of: (a) [the imposition of] the death penalty or execution; (b) torture or inhuman or degrading treatment or punishment in the country of origin; or (c) [a] serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

36. A particular significance is accorded to the assessment of credibility under Regulation 5(3) of the European Communities (Eligibility for Protection) Regulations 2006, as amended ('the 2006 Protection Regulations'), which transposed Article 4(5) of the Qualification Directive into domestic law. Borrowing from the language of the UN Handbook already quoted, Regulation 5(3) states:

'Where aspects of the protection applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met-

> (a) the applicant has made a genuine effort to substantiate his or her application,
>
> (b) all relevant elements at the applicant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given;
>
> (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
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> (d) the applicant has applied for protection at the earliest possible time, (except where an applicant demonstrates good reason for not having done so), and
>
> (e) the general credibility of the applicant has been established.'

37. As Charleton J reiterated in *F.N. v Minister for Justice* [2009] 1 IR 88 (at 102):

> 'The assessment of credibility has to be carried out in accordance with principles of constitutional justice. Where there is a significant error of fact essential to the decision, either as to its foundations or to buttress a crucial finding, a decision can be undermined: *Imafu v MJELR* [2005] IEHC 182, (Unreported, High Court, Clarke J., 27th May, 2005).'

(iii) The assessment of facts and circumstances in an application for subsidiary protection

38. As the paragraph just quoted suggests, Regulation 5 of the 2006 Protection Regulations was, at the material time, the provision governing the procedure within the State for the assessment of facts and circumstances in an application for subsidiary protection.

39. Regulation 5 (1), which closely – though not completely - mirrors Article 4(3) of the Qualification Directive, provides:

> 'The following matters shall be taken into consideration by a protection decision-maker for the purposes of making a protection decision:
>
> (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;
>
> (b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be the subject of persecution or serious harm;
>
> (c) the individual position and personal circumstances of the protection applicant including factors such as background, gender and age, so as to assess whether on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
>
> (d) whether the protection applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;
>
> (e) whether the applicant could reasonably be expected to avail himself of the protection of another country.'

40. Regulation 5(2) both reflects and exceeds the requirements of Article 4(4) of the Qualification Directive. It reflects them in its principal clause by providing:

> 'The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of serious harm, unless there are good reasons to consider such persecution or serious harm will not be repeated, …'

It exceeds them in the remaining part of that sentence, which continues:

> '…but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.'

That final clause has been extensively judicially considered; see *M.S.T. & J.T. v MJELR* [2009] IEHC 529 (Unreported, Cooke J, 4 December 2009); *S.N. v MJELR* [2011] IEHC 451 (Unreported, Hogan J, 27 July 2011); *J.T.M. v MJELR* [2012] IEHC 99 (Unreported, Cross J, 1 March 2012); *N.N. v MJELR* [2014] 3 IR 396 (Clark J); *S.I. v MJELR & Ors* [2016] IEHC 112 (Unreported, Humphreys J, 15 February 2016); and *B.A. v IPAT* [2017] IEHC 36 (Unreported, Keane J, 27 January 2017). As both Cooke J and Hogan J have observed (in *M.S.T.* and *S.N.* respectively), it is a kind of 'super-added' provision that does not fit conceptually with the fundamental purpose of subsidiary protection, namely, to protect an applicant from a real risk of serious harm in the future in his or her country of origin. As Clark J noted in N.N., the inspiration for (and language of) the final clause appears to be drawn from Article 1(C) of the Geneva Convention (reflected in s. 21(2) of the 1996 Act), whereby the circumstances in which refugee status ceases are deemed not to apply to a refugee who is able to invoke 'compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.' Article 3 of the Qualification Directive expressly permits Member States to introduce or retain more favourable standards for determining who qualifies as a person eligible for subsidiary protection, in so far as those standards are compatible with the Directive. Thus, as Hogan J put it in S.N., the final clause 'must be treated essentially as a species of national law which hovers over the terms of Article 4(4) of the Directive, but … which must nevertheless be interpreted in a manner compatible with the Directive itself.'

(iv) the subsidiary protection process generally under the 2006 Protection Regulations

41. In F.N., already cited, Charleton J considered the extent to which the principles concerning the proper approach to the final stage of the asylum process, articulated in cases such as *Kouaype v Minister for Justice* [2011] 2 IR 1 (Clarke J), continued to apply,

mutatis mutandis, to the subsidiary protection application process introduced under the 2006 Protection Regulations. He concluded (at 116):

> '[W]here an additional right is claimed to those which entitle an applicant to refugee status under s. 2 of the Refugee Act 1996, [the Minister], prior to deporting such an applicant, must further consider whether the claim made is the same in substance as that which has already been contended for and has failed before the Refugee Applications Commissioner and the Refugee Appeals Tribunal. If the matter is the assertion of a new right based on substantially new facts, then [the Minister] must consider it fairly.
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> …
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> Where the issue is subsidiary protection, it is the case that [this right exists] above any entitlement of the state to refuse to accommodate a non-citizen. Whether a right to subsidiary protection exists depends, however, on a fair assessment of the facts.'

42. *A.B.O. v MJELR* [2008] IEHC 191 (Unreported, Birmingham J, 27 June 2008) is a case that concerned a challenge to a decision by the Minister to refuse an application for subsidiary protection. Having failed in an application for refugee status, in circumstances where both the Office of the Refugee Commissioner and the Refugee Appeals Tribunal had rejected the credibility of the applicant's statements concerning the past persecution that she claimed gave rise to a well-founded fear of persecution if returned to her country of origin, the applicant sought a declaration of entitlement to subsidiary protection based upon the contents of the same statements, as demonstrating substantial grounds to believe she would face a real risk of suffering serious harm if returned to that country. The applicant challenged the refusal of that declaration on the ground, amongst others, that the Minister had erred in law in having regard to the adverse credibility findings of both the Commissioner and the RAT in respect of those statements, in light of certain alleged discrepancies between those findings. There does not appear to have been any dispute in that case about the Minister's entitlement to have regard to the Commissioner's, or the Tribunal's, findings on the credibility of the relevant statements per se. Nonetheless, Birmingham J observed (at paragraph 45):

> 'One must have regard to the fact that the whole concept of subsidiary protection is to offer protection to those who are seen as being at risk of serious harm for reasons and in circumstances that fall outside the scope of the 1951 Convention grounds (i.e. race, nationality, religion, membership of a particular social group, or political opinion). The objective of subsidiary protection is not to provide a further or parallel appeal against a conclusion reached after due deliberation that the applicant was not in fact at risk of serious harm.'

43. *N.D. v MJELR* [2012] IEHC 44 (Unreported, Cooke J, 2 February 2012) was a decision refusing leave to seek judicial review of the Minister's decision declining to grant a declaration of entitlement to subsidiary protection to the applicant in that case. Leave had been sought on the ground, amongst others, that, in considering the applicant's claim for a declaration of entitlement to subsidiary protection, the Minister had acted in breach of fair procedures by failing to engage with the applicant's representations concerning the adverse credibility findings made in the report on his refugee status claim prepared for the Refugee Applications Commissioner. It was an unusual feature of that case that, before applying for subsidiary protection, the applicant had withdrawn his appeal against the refusal of his refugee status claim, having received legal advice that he could not establish a Convention nexus in respect of the persecution (or serious harm) that he professed to fear.

44. Cooke J dealt with that argument in the following way:

> '11. Accordingly, in the subsidiary protection application it was sought to challenge the negative findings on credibility in the s. 12 Report and to invite [the Minister] to determine the application on the basis of the explanation then offered as to why he should have been believed. In the judgment of the Court, these arguments are not well founded because they fail to appreciate the essential procedural character of the international protection process which forms the basis of the common asylum system of the European Union.
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> 12. As pointed out in a number of recent judgments of the Court (see for example *BJSA [Nigeria] v Minister for Justice* [2011] IEHC 381) Ireland is now the only Member State which does not operate a unified or 'one-stop' procedure for a joint application for international protection of both kinds, namely, refugee status and subsidiary protection and under which a single decision making authority considers the asylum application first and then, if asylum is refused, immediately considers whether the applicant qualifies for subsidiary protection on the basis of the claim as assessed at that stage.
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> 13. Although Regulation 4(1)(a) of the 2006 Regulations requires a deportation proposal made under s. 3(3) of the Act of 1999, to invite a failed asylum seeker to make a separate application for subsidiary protection when the refusal of refugee status under s. 17(1) has been decided, the process remains, in the judgment of the Court, a continuing and coherent examination of the status of the applicant in international and European Union law in which the Minister as the decision maker in respect of subsidiary protection is entitled – and indeed obliged – to take into account the findings made in the asylum process and which have of course been accepted by him as the basis for his refusal of the declaration under s. 17(1) of the Act of 1996.
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> 14. The scheme of the 2006 [Regulations] when taken in conjunction with the Acts of 1996 and 1999 in complementing the asylum process, presupposes that the application for subsidiary protection will have been examined in the first instance during the asylum process before it comes to be considered under the Regulations by the Minister. It follows, in the view of the Court, that where the s. 13 Report (or for that matter the decision of the Tribunal on appeal) has found that an asylum seeker's claim is implausible or lacks credibility such that the events described or the facts relied upon are considered not to have happened or not to have involved the applicant, there is no obligation on the Minister to reconsider the same facts or events and to decide whether they should be considered plausible or credible in the light of the explanations given in the application for subsidiary protection; at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers. To require the Minister to do so would effectively convert an application for subsidiary protection into a form of second appeal against the refusal of a declaration of refugee status.
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> 15. It would also in the view of the Court, lead to an inherently contradictory result that in a case where any asylum claim based on past persecution for a specific Convention reason (race, religion, political opinion etc.) had been rejected on grounds of lack of credibility as to the events or facts relied upon, a challenge to those findings made in an application for subsidiary protection would require the Minister to decide not whether the applicant was eligible for that protection but whether the applicant was a refugee. It is a precondition of the admissibility of an application for subsidiary protection

that the applicant is not a refugee. (See the definition of "person eligible for subsidiary protection" in Article 2 of the Qualifications Directive (2004/83/EC) and Regulation 2(1) of the 2006 Regulations.)

16. It is nevertheless a necessary consequence of the legislative choice made to implement the provisions for subsidiary protection without a unified procedure before a single decision-maker and to invite the failed asylum seeker to make a distinct application that instances, even if rare, may arise in which an applicant will seek to rely upon a risk of harm from a source not previously considered in the asylum process. In such cases it will fall to the decision-maker in the subsidiary protection process to assess that claim as it is made and, where its assessment requires an evaluation of the personal credibility of the applicant, it may well be that the principle of fair procedures will require the decision-maker to interview the applicant for that purpose. Nothing in the 2006 Regulations precludes that being done. This however, is not such a case because the application for subsidiary protection is based upon an alleged fear or risk of serious harm and it is based upon the same source, person and events as had previously been rejected as incredible in the asylum process.'

45. The analysis in N.D. was expressly adopted in *H.M. v MJELR* [2012] IEHC 176 (Unreported, High Court, Cross J, 27 April 2012):

'28. In the injunction decision in this case,…, Hogan J. stated:-

"As I have already indicated, both [subsidiary protection] decisions rely heavily on the Tribunal's reasoning on the credibility and refugee sur place issues. This in itself if in principle perfectly acceptable, but where such reasoning is itself open to objection, the it will also infect the Minister's decision, even where the decision of the Tribunal has not been challenged in judicial review proceedings."

29. In *Ninga Mbi v. MJE* [2012] IEHC 125 (Unreported, High Court, Cross J, 23rd March, 2012), this Court referred to the above decision of Hogan J. and reconciled it with the decision of Cooke J. in [*N.D.*] when he stated:-

"It follows, in the view of the Court, that where the s. 13 Report (or for that matter the decision of the Tribunal on appeal) has found that an asylum seeker's claim is implausible or lacks credibility such that the events described or the facts relied upon are considered not to have happened or not to have involved the applicant, there is no obligation on the Minister to reconsider the same facts or events and to decide whether they should be considered plausible or credible in the light of the explanations given in the application for subsidiary protection; at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers."

30. In discussing the above authorities, this Court stated in Mbi (above):-

"29. The Minister is not under an obligation to revisit the factual findings especially including the credibility findings of the ORAC or the RAT. The function of the court when assessing the matter for the purposes of a judicial review is to establish whether or not in this case the Minister's decision was irrational…'

30. Accordingly, the passage from Hogan J. in HM quoted above, does not alter the established jurisprudence of the Court as pronounced by Cooke J. in [*N.D.*] (above): it is for the Minister in subsidiary protection [applications] to make his decision. He must do so on the basis of [the 2006 Regulations] always guarding against refoulement. It is only if the Minister errs in his conclusions, in the judicial review sense, that he could be successfully challenged. This challenge, of course, would include a challenge on the law as reaffirmed in Meadows. If the credibility of the applicant has been rejected by the RAT then unless the Minister's reasoning is defective then the Minister is entitled to rely upon this conclusion and cannot be successfully challenged if he does so…."'

(v) a sea-change in the jurisprudence?

46. *Barua v MJE* [2012] IEHC 456 (Unreported, High Court, Mac Eochaidh J, 9 November 2012) is the first of three cases that - the applicant in this case contends – represent a sea-change in the law set out in the jurisprudence that I have just described. In Barua, the applicant challenged a refusal by the Minister to grant a declaration of entitlement to subsidiary protection. In quashing that decision, MacEochaidh J found that the relevant decision maker had erred in various ways: first, by misapplying Regulation 5 of the Protection Regulations; second, by failing to engage properly with the documentary evidence submitted in support of the applicant's statements; third, by failing to give proper reasons for rejecting or ignoring that documentary evidence; and fourth, in adopting the adverse credibility findings underpinning the Tribunal's rejection of the applicant's claim to refugee status, which were themselves unreasonable or irrational.

47. The final section of the judgment addresses, and rejects, the Minister's argument that, having failed to challenge the Tribunal's adverse finding on credibility in respect of his refugee status application, the applicant was estopped or barred from doing so in the context of the decision to refuse him subsidiary protection in reliance upon that finding. As MacEochaidh J pointed out, the Minister's argument – for which no authority appears to have been invoked – runs directly contrary to the dictum of Hogan J in *H.M.*, already cited, that if a decision made at the subsidiary protection stage of the international protection process adopts a credibility finding made at the refugee status stage, it will be infected by any defect in the reasoning underpinning it, even where the decision of the Tribunal has not been challenged in judicial review proceedings. As Cross J reiterated in his decision in N.M., already cited, relying on his own earlier decision in Ninga Mbi, the Minister is entitled to rely at the subsidiary protection stage on an adverse credibility finding made at the refugee status determination stage, 'unless the Minister's reasoning [on credibility at the refugee status stage] is defective.'

48. As MacEochaidh J put it in *Barua* (at paragraph 37): 'This principle places an obligation on the Minister if adopting the findings of the Refugee Appeals Tribunal to ensure all findings were reasonable.' Of course, that is far from saying that the Minister cannot adopt any relevant credibility finding of the Tribunal in respect of any statement relied upon at both stages of the process, much less that the Minister is obliged to conduct a fresh credibility assessment in respect of any such statement in every case. Thus, to this point, I am in complete and respectful agreement with the judgment of Mac Eochaidh J.

49. However, it is the next part of the concluding portion of the judgment in Barua that has taken on a particular significance in later cases. MacEochaidh J continues:

'38. As I said earlier, the letter sent to the applicant informing him that his application for refugee status had been refused and telling him of the option to apply for subsidiary protection stated:

'Your application for subsidiary protection…is not an appeal against the refusal of refugee status.' [Emphasis not added]

39. The jurisprudence of the High Court says that the application for subsidiary protection is not an appeal from the decision of the Tribunal. That jurisprudence also makes plain that findings of the Tribunal must be considered by the Minister and that the Minister is entitled to adopt those findings. Where a lack of credibility led to a refusal of refugee status, how could the Minister, if both applications are based on the same facts, reverse such a decision on the second occasion? Yet the regulations require the Minister to consider all documents and matters submitted with the application for subsidiary protection and this is usually the same material previously submitted in connection with asylum issues. That consideration must be meaningful. Case law says the application for subsidiary protection is not an appeal from the Tribunal. This applicant for subsidiary protection was told (by letter from the respondent) that his application is not an appeal from the decision of the Tribunal (and presumably all applicants are told the same). Such statement implies that it will not involve a review of the earlier decision and the applicant is entitled to infer that he is not required or indeed not permitted to reopen the earlier decision.

40. These internal contradictions in the rules create an unsatisfactory situation. The contradictions are more stark when one considers that only failed asylum seekers may seek subsidiary protection. (I understand that there are proposals before the Oireachtas [the national parliament] for reform, mentioned recently by the Supreme Court (see para. 2.7 of the judgment of Clarke J. in *Okunade v MJELR* [2012] IESC 49)). It seems unfair that applicants make applications for subsidiary protection in circumstances where they are told it is not an appeal from the asylum decision, yet findings in that process may well determine the subsidiary protection application. It is also unfair to criticise applicants for failing on the second application to take issue with the asylum decision.

41. Rules of Court on third party procedure and provisions of the Civil Liability Acts 1961 (as amended) are designed to ensure that the same facts are not tried twice to avoid the possibility of different and conflicting results. The very opposite has been achieved in the Irish regime for international protection of persons claiming to be in fear of harm. Almost inevitably, the same facts will be tried twice. The applicant is told that it is a fresh application where all matters and documents will be considered. And the Minister is for practical purposes prevented from reconsidering his earlier decision though he is directed to consider the second application fully.

42. I am unwilling in this case to count the frailties of this unsatisfactory situation against the applicant. I reject the case made for the respondent that the failure of the applicant to challenge the decision of the Tribunal or to criticise the Tribunal in the subsidiary application process acts as a quasi estoppel or has the effect of disbarring the applicant from relief.'

50. It is not in controversy that the determination of an application for subsidiary protection is not an appeal against the refusal of an application for refugee status, whether in the context of a unitary or of a two-part international protection application process. But why should that mean, in the context of a two-part process, that a consideration of a distinct question (i.e. whether substantial grounds have been shown that there a real risk of serious harm to the applicant, rather than whether the applicant has established a well-founded fear of persecution on a Convention ground) requires two separate - and, by definition therefore, potentially conflicting - assessments on precisely the same question (i.e. that of the applicant's credibility in relation to a particular statement or statements upon which he or she seeks to rely for both purposes)?

51. It is true that, as Mac Eochaidh J pointed out, Regulation 5 (1) of the 2006 Protection Regulations, reflecting the requirements of Article 4(3) of the Qualification Directive, directs a protection decision-maker to take into consideration matters that include 'the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be the subject of persecution or serious harm', but I fail to see the difficulty where, having done so, the protection decision-maker adopts, on a reasoned basis, any finding of the refugee-status decision-maker on the credibility of those statements, considered in conjunction with those documents. If the relevant credibility finding of the refugee status decision-maker is tainted by a failure to properly consider relevant documentation, then there is no obligation on the protection decision-maker to adopt it. But in view of the more extensive benefits attached to refugee status than to subsidiary protection, in that case one might expect an applicant to seek to a fresh and proper determination of the credibility of the relevant statement(s) in the refugee status decision-making process, rather than to leave that finding unchallenged in that process and to challenge instead its adoption in the subsequent subsidiary protection one, should that occur.

52. It follows that, for my part, I do not see any internal contradiction in the applicable procedural rules, much less one that has led to the creation of an unsatisfactory situation. Nor do I see any unfairness to applicants of the kind suggested associated with the operation of a two-part, rather than unitary, international protection determination system.

53. The potential disadvantages to applicants (and, indeed, to the State) of a two-part process are, to my mind, essentially twofold. The first is the risk or likelihood that it may be more protracted than a unitary one. In that regard, the CJEU has pointed out that, while neither the Qualification Directive, the principle of effectiveness, nor the right to good administration preclude a two-part process, that must not give rise to a situation in which the application for subsidiary protection is considered only after an unreasonable length of time; Case C-604/12 *H.N. v MJELR*, (8 May 2014). While it can be argued that, in the case of a successful refugee status claim, a two-stage process is more efficient than a unitary one (because it saves the time and resources that must otherwise be expended on the concurrent presentation of what would then be a superfluous claim for subsidiary protection), the low success rate of refugee status claims considerably weakens that argument, even allowing for the fact that not all unsuccessful refugee status applicants will go on to apply for subsidiary protection. While the two-stage process was retained under the European Union (Subsidiary Protection) Regulations 2013, it has since been replaced by a unitary one under the International Protection Act 2015.

54. The second disadvantage, which any properly functioning system of adjudication must strive to avoid, is the risk of irreconcilable findings on the same facts or issues at the end of the process. Cooke J addressed that problem in the present context in the passage that I have already quoted from his judgment in N.D. (at para. 15), when he pointed to the starkly contradictory result that would occur if an adverse credibility finding on a specific statement or statements, which resulted in the rejection of a refugee status claim, became the subject of a favourable credibility finding on the same statement or statements in a subsidiary protection claim. What would the consequence of such a finding be?

55. It must be borne in mind that, as Cooke J pointed out in NM, it is a precondition of the admissibility of an application for subsidiary protection that the applicant is not a refugee. In the refugee status application process, there is a right of appeal to the tribunal and an entitlement to seek judicial review of the decision made on that appeal and, in more limited circumstances, of the decision made at first instance. Under s. 17(7D) of the 1996 Act, as amended, there is a separate and additional entitlement to seek readmission to the

refugee status application process where new elements or findings are found to be present. It is therefore necessary to posit a situation in which those avenues have not been pursued or have been pursued unsuccessfully in respect of an adverse credibility finding in respect of a given statement, at the time when an application for subsidiary protection is made in reliance, in whole or in part, upon the credibility of the same statement.

56. If the requirement under the Qualification Directive and the Protection Regulations that the protection decision-maker take into consideration 'the relevant statements and documentation presented by the protection applicant' implies a requirement to do so without regard to any prior adverse finding in respect of the credibility of any such statement at the refugee status stage of the international protection process, notwithstanding the appeal rights in - and procedural rights attendant upon - the conduct of that stage of the process, then the potential for irreconcilable findings is obvious, as is the adverse effect upon public confidence in the administration of the international protection system.

57. A fundamental maxim of the common law is interest rei publicae ut sit finis litium, which, freely translated, means that the public interest demands an end to the litigation of the same issue. A specific application of that maxim arises where an attempt is made to re-litigate an issue already the subject of a conclusive finding by a competent decision-maker. As Lord Diplock observed in the UK House of Lords in *Hunter v Chief Constable of West Midlands Police* [1981] 3 All ER 727, in the context of an attempt to re-litigate through a civil action an issue of fact that had been determined against the plaintiffs in a criminal trial (albeit, as it later turned out, in the unhappy context of a criminal trial that amounted to a grievous miscarriage of justice), there is:

> '…the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.'

58. That statement of the law has been approved – and the inherent jurisdiction it identifies exercised – in many cases in this jurisdiction where collateral attacks have been mounted on previous decisions in criminal and in civil cases; see, for example, *Kelly v Ireland* [1986] ILRM 318 and *Breathnach v Ireland (No. 2)* [1993] 2 IR 448 (in each case, an attempt in a civil action to challenge or reopen findings of fact made in an earlier criminal trial) and *McCauley v McDermott* [1997] 2 ILRM 486 (an attempt in a civil action to challenge findings of fact made in an earlier civil action arising out of the same events).

59. This general rule of public policy prohibiting a collateral attack upon a previous conclusive determination reached after a full and proper hearing is subject to an exception in special circumstances, such as the discovery of significant fresh evidence that could not have been made available by the exercise of reasonable diligence at the time of the relevant proceeding. In the context of a claim for international protection, that rule found expression at the material time in the provisions of s. 17 (7) to (7H) of the 1996 Act, as amended.

60. Accordingly, while I fully accept that one of the purposes of the rules of court that deal with the consolidation of multi-party actions is to minimise the risk of irreconcilable or conflicting judgments (the principle purpose of those rules being to aid in the efficient administration of justice overall), to my mind the suggestion that, in contrast, the two-stage international protection procedure under the 1996 Act, as amended, and the 2006 Protection Regulations necessarily creates, or increases, such a risk simply begs the question whether there is any applicable provision or principle of law that requires precisely the same issue(s) of credibility to be assessed completely separately twice consecutively as part of that procedure. For my part and for the reasons I have already set out, I cannot see that there is.

61. Two points are worth considering in this connection. First, this is not a multi-party process, but rather a multi-stage (or, more specifically, a two-part) one. Second, if an analogy is to be drawn with the rules of court governing civil procedure, it must be acknowledged that those rules specifically envisage a multi-stage procedure in various situations. An obvious example is where a court permits the trial of a civil action on the issue of liability only, to be followed, if liability is made out and it then proves necessary, by a further trial on the issue of the appropriate quantum of damages. It seems to me that this provides a closer (and, thus, better) analogy with the two-part international protection process that operated at the material time, whereby an adjudication took place solely on the applicant's claim for refugee status, to be followed, if that claim failed and it then proved necessary, by a further adjudication on any claim by the applicant for a declaration of entitlement to subsidiary protection. I do not think it can be seriously suggested that a plaintiff in a civil action, part of whose claim on liability has failed because of an adverse finding on the credibility of his evidence, could insist, as an aspect of any fair trial right, on a fresh assessment of the credibility of his evidence on the rejected part of his claim as part of the second stage assessment of the appropriate quantum of damages to which he is entitled. There is nothing innately unfair in relying upon a credibility finding made at one stage of a procedure as part of the adjudication at a later stage of the procedure, once the hearing that led to that finding was fair and the finding was, or is, subject to appeal or review, or both, as the relevant law requires.

62. Even in a unitary system, such as the one that now operates under the International Protection Act 2015 or that which operates in the UK (where subsidiary protection is described as 'humanitarian protection') under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and the Immigration Rules there, consideration of a claim for subsidiary protection can only logically occur after a negative adjudication on refugee status and, under Article 4(3) of the Qualification Directive, account must be taken in assessing each claim of, amongst other things, 'the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm.' I do not believe it has ever been suggested that, where an applicant seeks to rely on the same statement in support of a claim for both refugee status and subsidiary protection, to properly consider each the decision-maker in a unitary procedure is required to assess the issue of the credibility of that statement twice separately. That decision-maker is, of course, entitled to adopt his or her earlier finding in the refugee status claim on the credibility (or lack of credibility) of that statement, in so far as it is relied upon in the subsidiary protection claim. While, plainly, the two-stage process now at issue involves two separate decision-makers, I cannot see the conceptual basis for the argument that, as an aspect of fair trial rights or fair procedures, in a unitary process a single decision-maker can adopt his or her own earlier credibility finding for the purpose of a second decision (where that issue of credibility is relevant to both), but in a two-part process the second decision-maker cannot adopt the earlier credibility finding of the first decision-maker but must, instead, re-adjudicate upon the credibility of the same statement from scratch.

63. For that reason, I must respectfully disagree with the view expressed by Mac Eochaidh J that it is unfair that, although an application for subsidiary protection is not an appeal against a refusal of refugee status, findings in the refugee status application may well determine the application for subsidiary protection. That criticism applies equally to the operation of a unitary international protection process. If an applicant relies upon the credibility of a certain statement for the purpose of advancing his or her claim in two different applications as part of the same overall process, I cannot see how he or she is entitled either to have the second application treated as an appeal from the first or, for that matter, to have the credibility of that single statement assessed twice

separately within that process. That is not to say that, in the subsidiary protection part of the process, an applicant cannot challenge an adverse credibility finding made in the refugee status application part of the process on the basis of new evidence, new information, or a material error (or irrationality) in the reasoning underpinning that finding; only that the applicant cannot have the credibility of the same statement assessed twice entirely discretely (and, hence, perhaps differently) as of right in the absence of one or more of those factors.

64. To that extent, it seems to me that Humphreys J described the position correctly in *A.W. v MJE (No. 2)* [2016] IEHC 111 (Unreported, 15 February, 2016) in observing that 'the Minister is required to form a fresh view of credibility rather than simply to consider himself bound by the tribunal's findings.' That is not to say that, in forming a fresh view of credibility, the Minister is bound to completely disregard the earlier assessment of the tribunal in that regard. It means only that that he cannot treat that assessment as inevitably dispositive of the issue.

65. The key decision upon which the applicant relies is that of *M.M. v MJELR (No. 3)* [2013] 1 IR 370.

66. In *M.M. v MJELR (No. 1)* [2011] IEHC 547 (Unreported, High Court, 18 May 2011), Hogan J had made a preliminary reference to the CJEU concerning whether the requirement to co-operate with an applicant for international protection imposed on a Member State in Article 4(1) of the Qualification Directive requires the relevant administrative decision-maker in each Member State to provide every applicant with an assessment of his or her claim in draft form to enable the applicant to address those aspects of that assessment that suggest a negative decision overall. While the Court respectfully suggested that the question should be answered in the negative, the reference was made because of a decision of the Administrative Jurisdiction Council of the Dutch Council of State (Raad von State), which appeared to provide support for that position.

67. In its judgment in Case C-277/11 *M.M. v MJELR* (ECLI:EU:C:2012:744) (22 November 2012), the CJEU answered the question in the negative.

68. Noting (at para. 76) that there are 'two separate procedures, one after the other, for examining asylum applications and subsidiary protection applications respectively', the CJEU went on to state that, in order to provide the referring court with a useful answer, it was important to determine whether it is unlawful under EU law not to hold a further hearing of the applicant in the course of examination of the second application and prior to rejection of that application on the ground that the applicant has already been heard during the refugee status application procedure.

69. The CJEU pointed out that the Procedures Directive only applies to applications for subsidiary protection made as part of a single procedure determining claims for international protection. Thus, in strict law, the safeguards in the Procedures Directive are only directly applicable to the refugee status application stage of the international protection process in Ireland.

70. Paragraph 80 of the judgment then continues:

> 'With regard more particularly to the right of an applicant to be heard before a decision is adopted, the High Court has stated in its order for reference that, according to national case-law, it is not necessary to observe that procedural requirement when dealing with an application for subsidiary protection made following rejection of an asylum application, given that the applicant will already have been heard in the examination of his asylum application and given that the two procedures are closely linked.'

71. The passage just quoted is not easy to interpret. For my part, it is not clear to me what is meant by the statement that, according to national case-law, it is not necessary to observe the procedural requirement of the applicant's right to be heard in an application for subsidiary protection. Before turning to consider the applicable principles of EU law, it is worth summarising the procedural requirements that apply under the law of the State to an application for subsidiary protection under the 2006 Protection Regulations. They include the following:

> (i) the requirement on the Minister to observe natural and constitutional justice and fair procedures under the Constitution of Ireland as those principles apply to the subsidiary protection determination process;
>
> (ii) the requirement on the Minister to notify a person who is the subject of a deportation order proposal, having failed in an application for refugee status, that he or she may make an application for subsidiary protection; Regulation 4(1)(a) of the 2006 Protection Regulations;
>
> (iii) the requirement on the Minister to consider any such application for subsidiary protection made in the prescribed form or a form to the same effect; Regulation 4(3)(a). The prescribed form requires the applicant to indicate the basis upon which 'serious harm' is being claimed; to set out fully the facts being relied upon in support of the application; to submit all documentary evidence available that supports the application; to identify any documentation already submitted (in support of the earlier refugee status application) that supports the application; and to provide an explanation, if there is one, where no such supporting documentation is provided; per Schedule 1 to the 2006 Protection Regulations;
>
> (iv) the discretion vested in the Minister to consider the information or documentation taken into consideration in relation to the applicant's earlier claim for refugee status and such other information relevant to the application as is within the Minister's knowledge; Regulation 4(3)(b);
>
> (v) the requirement on the Minister to take into account all of those matters prescribed under Article 4 of the Qualification Directive (as transposed under Regulation 5 of the 2006 Protection Regulations, which includes a more favourable standard for determining who qualifies as a person eligible for subsidiary protection than that set out in Article 4(2) of the Qualification Directive, as is expressly permitted under Article 3 of the said Directive);
>
> (vi) the requirement on the Minister to assess the credibility of any statement or statements asserting a risk of serious harm not previously considered in the refugee status part of the international protection process, to include, where an evaluation of the personal credibility of the applicant is required under the principles of natural and constitutional justice and fair procedures, the conduct of an interview with the applicant for that purpose; N.D. v MJELR, already cited; and
>
> (vii) the requirement to reconsider the credibility of any statement or statements asserting a risk of persecution or serious harm previously considered in the refugee status determination part of the of the international protection process and found to be not credible, where new evidence, information or some other basis can be demonstrated that establishes material error on the part of the refugee status decision-maker, vitiating that earlier credibility finding; N.D. v MJELR and

Ninga Mbi v. MJE, already cited.

72. Returning to the judgment of the CJEU in M.M., it next proceeds to set out the following fundamental principles of EU law: that there must be observance of the rights of the defence; that the right to be heard is now affirmed not only in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter'), which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 51, which guarantees the right to good administration; that the right to be heard is important and broad in scope; that observance of the right is required even where applicable legislation does not expressly provide for it; that the right guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of an adverse decision; that the right requires the authorities to pay due attention to the observations thus submitted, and to give concrete and specific reasons for an adverse decision that are reasonably capable of being understood; and that it follows from all of these principles that the right to be heard must apply fully to the procedure whereby a Member State examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System.

73. The judgment continues:

> '90. In that regard, the Court cannot accept the view put forward by the referring court and Ireland that, where – as in Ireland – an application for subsidiary protection is dealt with in a separate procedure, necessarily after the rejection of any asylum application upon conclusion of an examination in which the applicant has been heard, it is not necessary for the applicant to be heard again for the purpose of considering his application for subsidiary protection because the formality of a hearing in a sense replicates the hearing which he has already had in a largely similar context.
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> 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, the 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 [the Qualification Directive], 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.
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> 93. It should be added that, according to the Court's settled case-law, the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law (see Joined Cases C-411/10 and C-493/10 N.S. and Others [2011] ECR I-13905, paragraph 77).
>
> 94. It is in light of that guidance as to the interpretation of EU law that it will be for the referring court to determine whether the procedure followed in the examination of Mr M.'s application for subsidiary protection was compatible with the requirements of EU law and, should it find that Mr M.'s right to be heard was infringed, to draw all the necessary inferences therefrom.'

74. The judgment of the CJEU concludes with a final paragraph answering the question referred in the negative and then appending the following additional text:

> '…- however, in the case of a system such as that established by the national legislation at issue in the main proceedings, a feature of which is that there are two separate procedures one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, it is 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 the procedural requirement may be dispenses with in the procedure relating to the application for subsidiary protection.'

75. *M.M. v. MJELR (No. 2)* [2011] IEHC 346 (Unreported, High Court, 5th September 2011) was a judgment on an application for an interlocutory injunction restraining the proposed deportation of the applicant pending the outcome of the preliminary reference. It is not directly relevant to any of the matters now at issue.

76. When the proceedings came back before the High Court upon the completion of the preliminary reference procedure, judgment was ultimately given in *M.M. v MJELR (No. 3)* [2013] 1 I.R. 370. Duly noting the answer that the CJEU had provided to the specific question referred, Hogan J identified the remaining question before the Court as being the extent to which the Minister is obliged to give an applicant a separate right to be heard in respect of a subsidiary protection application.

77. Quoting the passages to which I have already referred in the judgment of the CJEU on the preliminary reference, Hogan J continued (at p 381 of the report):

> '[22] What conclusions, therefore, are to be drawn from these passages in the judgment? It must be recalled that my judgment of the 18th May 2011, did not address the general question of fair procedures at subsidiary protection stage since that question – as distinct from any specific procedural obligation imposed on the Minister by Article 4(1) of the Qualification Directive – was never argued before me at that point (see [2011] IEHC 547). Again, however, inasmuch as my judgment (impliedly) rejects the right to a hearing at subsidiary protection stage, it is the right to some form of oral hearing.
>
> [23] All of this is, I think, of some importance in understanding the import of the second part of the court's judgment. After all, the opinion of Advocate General Bot (which had been delivered on the 26th April, 2012), had described the written procedure which was actually followed in respect of Mr. M.'s subsidiary protection application in complete detail and with pellucid clarity: see here, in particular, paras. 96 to 106 of that opinion. In these circumstances, it cannot realistically be contended that the European Court of Justice was somehow unaware of the fact that a separate written procedure had been followed with regard to Mr. M.'s subsidiary protection application. In any event, the entire argument based on the article 4(1) issue had been directed to one specific aspect of that particular written procedure.

[24] In this context it may be observed that the court had earlier noted, at para. 35, that:-

"There is no provision in the 2006 Regulations for the applicant for subsidiary protection to be heard in the course of examination of his application ('d'une telle protection subsidiaire est entendu ')('seines Antrags angehört wird ')".

[25] It must be accepted that this paragraph might be thought to imply that the court was here referring of necessity to an oral hearing, because, of course, the Regulations of 2006 do provide for a hearing (albeit by means of a written procedure) inasmuch, for example, as article 5(1)(b) of the Regulations of 2006 imposes an obligation on the decision maker to consult and consider all relevant information supplied by the applicant.

[26] At the same time, the judgment of the European Court of Justice, when read in its totality cannot be interpreted as meaning that an oral hearing would be routinely required at subsidiary protection stage. One imagines that if this had been required, then the European Court of Justice would have said so in direct and unambiguous terms. Nor was any direct analogy drawn between the present case and the requirement for a personal interview in the case of applicants for international protection prescribed by the Procedures Directives. Moreover, the case law referred to in the judgment of the Court of Justice - ranging from *Transocean Marine Paint v. Commission* (Case 17/74) [1974] E.C.R. 1063 to *France v. People's Mojahedin Organisation of Iran* (Case C-27/09 P) [2013] All E.R. (E.C.) 347 - all deal with the general right to fair procedures as a general principle of European Union law. None of this case law deals with the right to an oral hearing as such.

[27] In this regard, while English remains the authoritative text of the judgment, I was invited nonetheless to consult certain other language versions with a view to assisting in an understanding of what the judgment actually decided. It is certainly true that, for example, the words used in the French and German versions of the judgment ("une nouvelle audition ", "erneut anzuhören ") can - depending on the context - suggest that the hearing in question must be an oral one, but in truth these words (and similar cognate words) suffer from the same latent ambiguity as English words such as "to hear" and "hearing" in that they can also be used to describe a written procedure (e.g. , "schriftliche Anhörung " in German) as well as an oral hearing. In these circumstances, I do not think that consulting other language versions of the judgment (which, in any event, are not authoritative) can assist in resolving these ambiguities.

[28] It is true that at the renewed hearing of the 11th January, 2013, there was much discussion of whether the European Court of Justice had been correct in ascribing to me the views which it did at paras. 76, 80 and 90 of the judgment regarding the necessity for a hearing at subsidiary protection stage. Counsel for the applicant accepted that I had not said this in express terms in either my judgment or the order for reference. He rather urged that the European Court of Justice had been influenced by a series of decisions of this court which had rejected the necessity for an oral hearing, some of which indeed post-dated the order for reference of June, 2011 but on which he had relied at the oral procedure in Luxembourg, such as *N.O. v. Minister for Justice* [2011] IEHC 472 (High Court, Ryan J., 14th December, 2011) and *O.J. v. Minister for Justice* [2012] IEHC 71, (Unreported, High Court, Cross J., 3rd February, 2012). Counsel for the applicant suggested that the reference to the views of the High Court in the judgment of the European Court of Justice should accordingly be understood as referring to the views of the High Court collectively as reflected in a series of judgments dealing with the subsidiary protection procedures.

[29] Counsel for the Minister respectfully - but firmly - suggested that the European Court of Justice had fallen into error in ascribing the views which it did to me. He suggested, however, that as the court could not have - and did not hold - that there was any entitlement to an oral hearing, this had no material consequence for the present case.

[30] For my part, just as the European Court of Justice will not seek to challenge or in some way look behind findings of fact made by the national court in the context of an Article 267 TFEU reference (see, e.g., *WWF and others v. Autonome Provinz Bozen and others* (Case C-435/97 [1999] E.C.R. I-5613, at paras. 31 to 33), I consider that a similar principle should operate in reverse. It would not, I think, be seemly or appropriate for this court to challenge - whether directly or indirectly - the analysis of my judgment or the order for reference which was conducted by the European Court of Justice. The duty of loyal cooperation between the national courts and the European Court of Justice requires no less.

[31] 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 re visit 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.

[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.'

78. It seems to me that the last two paragraphs just quoted from the erudite analysis of Hogan J are at the heart of the present case and require careful consideration. What was troubling the CJEU? What was the purpose of the guidance that it gave on the right to be heard? The conclusion of Hogan J on that question was that, in providing that guidance, the CJEU was not simply emphasising that in a two-part procedure an applicant must be separately heard at each stage. Nor was the CJEU merely pointing out that a decision on subsidiary protection cannot be based on the same reasons as a decision on refugee status, in view of the different qualifying conditions for, and rights attached to, each. Rather, the CJEU was going significantly further in implying (though not stating), that, where an applicant seeks to rely on the same statement for both purposes, the Minister cannot rely on the adverse credibility findings made in the asylum application as a ground for rejecting the subsidiary protection application.

79. Yet, the evident expression of disapproval at paragraph 92 of the judgment of the CJEU is not directed at the Minister's reliance on the adverse credibility findings made in the asylum application as a ground for rejecting the subsidiary protection application – certainly, not in terms. It refers to the information provided by the referring court that the competent authority (on behalf of the

Minister) had, '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 the asylum application.' And that more general statement seems to me to cover a much broader range of possible concerns, including: a perceived failure or refusal to consider the separate test for subsidiary protection; or to consider the credibility of statements relied on to meet that test (which were not relied on to meet the test for refugee status and the credibility of which had, therefore, not already been assessed); or to consider whether new evidence, information or some other basis could be demonstrated to establish material error on the part of the refugee status decision-maker, vitiating that earlier credibility finding and requiring a new or different assessment of the credibility of the relevant statement or statements.

80. The emphasis of the CJEU on the fact that the asylum and subsidiary protection procedures presently contained in Irish law are distinct and different, might just as easily reflect one of these concerns (each of which deals with a failure or refusal that would amount to a breach of the requirements of the applicable national law), as a concern that, in a two-stage procedure where an applicant relies upon the same statement in support of his claim to meet one or other of two distinct tests, there has been a failure to ensure that the credibility of that one statement is separately assessed twice, regardless of the risk that must result of conflicting findings of fact on the same evidence within the international protection system under domestic law.

81. While it is necessarily just speculation (albeit speculation informed to some extent by the judgment of the CJEU on the subsequent preliminary reference by the Supreme Court in Case C-560/14 *M v Minister for Justice and Equality & Ors* (9 February 2017), to which I will return below), it seems to me most likely that the CJEU was simply concerned to emphasise that, although the Procedures Directive does not apply where a Member State has established separate consecutive procedures for examining refugee status applications and subsidiary protection ones, the nature and scope of the right to be heard under EU law must be fully guaranteed under the latter, lest it be suggested that, by falling outside the scope of the Procedures Directive, a separate subsidiary protection application procedure could limit or exclude an applicant's right to be heard as a matter of EU law. It appears to me much less likely that the CJEU was purporting to have examined or considered the subsidiary protection procedure in Ireland and to have found, if only by implication, that it then operated in breach of that right in the manner suggested.

82. Echoing the observation that Hogan J made in response to the argument in M.M. (No. 3) that the CJEU judgment in the preliminary reference could be interpreted as requiring an oral hearing in every subsidiary protection application, I conclude that, if the CJEU had determined that, where an applicant's statement was the subject of an adverse credibility assessment in the course of a refugee status application, precisely the same credibility assessment had to be carried out separately and from scratch in the course of a subsequent subsidiary protection application in every case, one imagines the CJEU would have said so in direct and unambiguous terms.

83. As the CJEU made clear in Case C-435/97 *WWF and others v. Autonome Provinz Bozen and others* [1999] E.C.R. I-05613, Article 177 of the Treaty of Rome (now Article 267 of the Treaty of the Functioning of the European Union ('TFEU')) is based on a clear separation of functions between national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it (at para. 31). It is for the national court to ascertain the facts which have given rise to the dispute (at para. 32) and it is not for the Court of Justice to determine whether there has been compliance with the rules of national law governing the organisation of the courts and their procedure (at para. 33). In other words, while there is a reciprocal duty of loyal or sincere co-operation between national courts and the CJEU, there is an obvious asymmetry of information between them concerning the facts underlying a dispute that is the subject of a reference and the national law applicable to those facts. And while the Opinion of Advocate General Bot (delivered on the 26th April, 2012) on the preliminary reference in M.M. did indeed describe, clearly and in some detail (at paras. 100 to 105), the procedure that was followed in the subsidiary protection application in that case, it did not purport to address the wider legal and procedural framework governing such applications generally under national law.

84. Hogan J continued his judgment and analysis in M.M. (No. 3) by considering the decision of Cooke J in N.D., already discussed, in light of the CJEU's judgment, concluding (at 388):

> '[37] If one proceeds from the premise that subsidiary protection is really just another step in the entire process of international protection, then the powerful analysis of Cooke J. contained in the passages just quoted from *N.D. v Minister for Justice* [and reproduced, at greater length, in para 44 of the present judgment] must be regarded as entirely compelling: see here also the comments made by Cross J. in a similar vein in *H.M. v. Minister for Justice* [reproduced at para 45 above]. It seems to me nevertheless that this reasoning must, however, be now regarded as having been superseded by the judgment of the European 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 our, subsidiary protection must be evaluated separately and distinctly from the determination of the asylum application.'

85. I find myself in respectful disagreement with the final clause of the foregoing analysis on two points. The first is, perhaps, semantic. I would prefer not to use the word 'bifurcated' to describe the architecture of the international protection procedure then in operation within the State because that procedure neither branched nor forked i.e. the pursuit of one claim was never an alternative to the pursuit of the other. Rather, when both such claims were made, they were heard consecutively. An applicant's claim for refugee status was required to be heard and determined first and only where that claim failed was the claim for subsidiary protection heard and determined afterwards. The route for an applicant was a linear - rather than bifurcated – one, with three possible destinations along the line: refugee status, subsidiary protection or the refusal of either form of international protection.

86. The second point of disagreement is more fundamental. I read the judgment of the CJEU as acknowledging, rather than requiring, that, in a system containing separate procedures for each, claims to refugee status and subsidiary protection must be examined separately. The CJEU points out that, while such a procedural framework is entirely permissible in principle, it does entail fully guaranteeing the applicant's fundamental rights, in particular the right to be heard, in respect of each claim. I do not read the judgment as stating or implying that the right to be heard in such a system extends further to an entitlement to have the credibility of the same statement evaluated entirely separately and from scratch in respect of each procedure where an applicant seeks to rely on that statement for both purposes. Thus, the powerful and compelling reasoning of Cooke J in N.M. does not seem to me to have been superseded by the judgment of the CJEU on the preliminary reference from the High Court in M.M.

87. Hogan J went on to consider the decision of Mac Eochaidh J in Barua, already discussed above, identifying it as anticipating what Hogan J viewed as the implicit position of the CJEU in M.M. A jurisprudential circle of a sort became complete when, subsequently, in *D-N & Ors v MJE* [2013] IEHC 447, Mac Eochaidh J held himself bound by the decision of Hogan J in M.M. (No. 3) that the CJEU had implicitly adopted or endorsed his reasoning in Barua with the consequence that the subsidiary protection decision in that case was invalid because 'the Minister relied completely on the adverse credibility findings which were made by the tribunal'.

88. The relevant portion of the judgment of Hogan J concludes as follows (at 390-1):

> '[46] In these circumstances, in 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 the military prosecutor and because he made no independent and separate adjudication on these claims.
>
> [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.'

89. In my judgment, while it is clear that the right to a fair hearing (or the right to be heard) includes a requirement that, where there are separate procedures for examining claims for refugee status and subsidiary protection, each must be examined separately and independently, it does not follow that, where an applicant relies upon the credibility of a particular statement for both purposes, the separate and independent examination of each claim requires the assessment of the credibility of that statement twice separately or, differently put, that it precludes the subsidiary protection decision-maker from adopting, in a reasoned way, the relevant credibility assessment of the refugee status decision-maker, where there is no new evidence, information or other demonstrated basis that establishes material error on that decision-maker's part, capable of vitiating that finding. In that sense, an applicant for subsidiary protection must be permitted to make his case and must be afforded the necessary opportunity to demonstrate material error in any adverse credibility finding on the part of the refugee status decision-maker in respect of any statement that he seeks to rely on for both purposes, but has no entitlement as of right to a second, separate and discrete credibility assessment from scratch.

90. In so far as I can tell, nothing in the various decisions cited by the CJEU in M.M. (at paras 81-88) as illustrating the nature and scope of the rights of the defence and, more particularly, the right to be heard as fundamental principles in EU law, now recognised in Articles 41, 47 and 48 of the Charter, is inconsistent with the view I have just expressed. While those decisions make clear that the right to be heard guarantees every person the right to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely, none of them posits - as an aspect of, or corollary to, that right - an entitlement to have the credibility of the same statement assessed twice separately where different forms of international protection are claimed in consecutive procedures in reliance upon it. Similarly, while the right requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all of the relevant aspects of the individual case and giving a detailed statement of the reasons for their decision, none of the cases suggests that the reasoned adoption of an adverse credibility finding made by a previous decision-maker in respect of a particular statement cannot result from that careful and impartial examination, absent new evidence, information or other demonstrated basis that establishes material error on that decision-maker's part, capable of vitiating that finding.

(vi) subsequent developments

91. The decision of the High Court in M.M. (No. 3) was appealed to the Supreme Court. On 24 November 2014, the Supreme Court referred the following question to the CJEU for a further preliminary ruling:

> 'Does the "right to be heard" in European Union law require that an applicant for subsidiary protection, made pursuant to Council Directive 2004/83/EC, be accorded an oral hearing of that 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 other, for examining applications for refugee status and applications for subsidiary protection, respectively?'

92. In these proceedings, at the trial of the application on 22 February 2017, neither side referred to the existence of the Supreme Court appeal - and further preliminary reference to the CJEU - in M.M. That is surprising, since the CJEU gave judgment on that preliminary reference in Case C-560/14 *M v Minister for Justice and Equality, Ireland and the Attorney General* on 9 February 2017, Advocate General Mengozzi having delivered his Opinion on it on 3 May 2016. The CJEU ruled on the question raised in the following terms (at paragraph 58 of the judgment):

> 'The right to be heard, as applicable in the context of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as person who otherwise need international protection and the content of the protection granted, does not require, as a rule, that, where national legislation, such as that at issue in the main proceedings, provides for two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, the applicant for subsidiary protection is to have the right to an interview relating to his application and the right to call or cross-examine witnesses when that interview takes place.
>
> An interview must nonetheless be arranged where specific circumstances, relating to the elements available to the competent authority or to the personal or 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, a matter which is for the referring court to establish.'

93. The judgment of the CJEU sheds new light on the issues addressed in M.M. (No. 3). First, the CJEU reiterates (at paragraph 29) that, at paragraph 90 of its earlier judgment, it had merely stated that it could not accept the view that the fact that an applicant has already been heard in an asylum application makes it unnecessary to arrange a hearing when a subsequent application for subsidiary protection is being examined:

> 'Thus, the Court simply pointed out the need to ensure that the right of the applicant for subsidiary protection to be heard is observed even if he has already been heard in the course of the examination of his asylum application, and did not thereby find an obligation that an interview relating to the application for subsidiary protection must be arranged in all circumstances.'

94. Once again, the CJEU did not identify any specific aspect of the pre-existing national law as incompatible with the right to be

heard and certainly did not state that the Minister would be acting in breach of that right by not recognising an entitlement to have the credibility of the same statement assessed twice separately from scratch in every instance in which both refugee status and subsidiary protection are claimed in reliance wholly or partly upon it.

95. Second, having noted that a procedure, which only permits an applicant for subsidiary protection to set out his views in written form, can, if sufficiently flexible, amount to observance of his right to be heard, the CJEU went on to observe:

> '42. Furthermore, it should be recalled that, in a situation such as that at issue in the main proceedings, the examination of the application for subsidiary protection takes place following an asylum procedure, during which the applicant for international protection had an interview relating to his asylum application.
>
> 43. Certain information or material gathered at that interview could also prove useful for assessing the merits of an application for subsidiary protection. In particular, material relating to the applicant's position or his personal circumstances could be relevant both for examination of his asylum application and for examination of his application for subsidiary protection.
>
> 44. Accordingly, whilst an interview conducted during the asylum procedure is not, as such, sufficient to ensure observance of the applicant's right to be heard in relation to his application for subsidiary protection (see, to that effect, judgment of 22 November 2012, M., C-277/11, EU:C:2012:744, paragraph 90), it is, however, possible for the competent authority to take into account, for the purpose of examining the application for subsidiary protection, certain information or material gathered at such an interview which contribute to its ability to determine that application with full knowledge of the facts.'

96. Thus, the CJEU expressly acknowledges that, while the refugee status and subsidiary protection examination procedures occur separately one after the other, it does not follow that, as an aspect of the applicant's right to be heard, they must occur in separate hermetically-sealed compartments, whereby no regard whatsoever can be had in the latter to any aspect of the evidence or findings in the former. That being so, it is difficult to accept the proposition that, nonetheless, at paragraph 90 of its earlier judgment, the CJEU had asserted – though only by implication - that the applicant's right to be heard requires that a properly reasoned credibility finding in the former cannot be considered, much less adopted, in the latter, even where no new evidence, information or other basis capable of undermining that finding is identified or advanced.

97. Third, the finding of the CJEU that the right to be heard does not require, as a rule, that, under the national law procedures at issue, the applicant for subsidiary protection is to have the right to an oral hearing is one that is, at best, difficult and, at worst, impossible to reconcile with the proposition that the same right does require, in every such case, the separate assessment from scratch of the credibility of any statement relied upon by the applicant though already found to lack credibility in the refugee status procedure, even in the absence of new evidence, new information or any other basis upon which that finding might reasonably be reconsidered or departed from. If it were necessary to conduct an assessment de novo of the credibility of an applicant's statement in every claim for subsidiary protection, then it is difficult to see how the fair conduct of that assessment would not also entail an entitlement to an oral hearing in every case.

98. For these reasons, it seems to me that the judgment of the CJEU on the preliminary reference from the Supreme Court in M.M. strongly suggests that nothing in its earlier judgment on the preliminary reference from the High Court in the same case was intended to supersede, or has had the effect of superseding, the hitherto settled and coherent principles identified and applied by Cooke J in N.D. and endorsed by Cross J in H.M. Insofar as there is any direct conflict between those earlier authorities and the later decisions in Barua, M.M. (No. 3) and D-N & Ors, already cited, for the reasons I have already given, the former appear to me to state the law correctly.

99. Thus, the position as I understand it is that, for the hearing of an application for subsidiary protection to be effective in the sense understood by the CJEU, while it is necessary to conduct a separate and independent examination of that claim, it is not necessary to reconsider ab initio the credibility of a statement already the subject of a properly reasoned adverse credibility assessment in the preceding application for refugee status or, differently put, it is not necessary to treat any such adverse credibility finding as immaterial or irrelevant, certainly in the absence of any new evidence, information or other basis capable of undermining it.

The arguments

100. The applicant elected to present and argue her case as one of broad principle rather than specific detail. Although the kernel of her challenge to the Minister's decision of 30 September 2015 to refuse consent to a second application for a declaration of entitlement to subsidiary protection is the asserted failure by the Minister to acknowledge that the original subsidiary protection procedure – as reflected in the ultimate subsidiary protection refusal recommendation to the Minister of 24 January 2011 - breached the applicant's EU law right to be heard, she does not exhibit that recommendation and the Court has never had sight of it. Instead, the applicant relies on the criticism of, and selected fragmentary quotations from, that recommendation that are set out in the subsequent correspondence from her solicitor to the Minister.

101. Nonetheless, it is clear from the terms of that correspondence – in particular, the letter of 19 November 2013 – that the applicant does not make any case of the kind recognised by Hogan J in *M (H) v MJELR* [2011] IEHC 16 (Unreported, High Court, 21, January 2011) (at para. 36) whereby, in adopting the reasoning underpinning an earlier adverse credibility finding by the tribunal in respect of a statement relied upon by the applicant for both a refugee status and a subsidiary protection claim, the Minister's decision on the latter is infected by any established defect in that reasoning. Nor can I find anything in the fragmentary quotations from the subsidiary protection recommendation included in that correspondence to support the case that the Minister was holding himself strictly bound by, rather than merely entitled to take into consideration, the earlier adverse credibility finding of the tribunal.

102. Thus, if the present challenge is to succeed, it can only be on the basis that the decision of Hogan J. in M.M. (No. 3), already discussed, is authority for the much broader proposition that the Minister's conclusion on the credibility of such a statement in the examination of a claim for subsidiary protection will be vitiated if any regard whatsoever is had to any earlier credibility finding on that statement in the course of the preceding claim for refugee status, which proposition is said to be a corollary of the EU law right to be heard in the context of that procedure, as implied by the CJEU in Case C-277/11, and later acknowledged by the High Court, in M.M. (No. 3). For the reasons I have already given, I do not believe that the decision of the CJEU goes so far.

103. The applicant's challenge thus fails in limine, and it follows that it is unnecessary to consider her consequential argument that the proposition concerned represents a development in both domestic and European Union jurisprudence, which: (a) constitutes a new element or finding that makes it significantly more likely that the applicant will qualify for subsidiary protection; and (b) is one that the applicant could not have presented through no fault of her own in her original subsidiary protection application, thereby

requiring the Minister, under s. 17(7E) of the 1996 Act, as amended, to consent to the making of a further application for subsidiary protection and invalidating the Minister's refusal to do so in this case.

104. In that context, the applicant relies upon *Smith v Minister for Justice and Equality*, [2013] IESC 4 (Unreported, 1February 2013) in which the Supreme Court (per Clarke J; Denham and McKechnie JJ concurring) found it arguable at the leave stage that a material change of that sort in the relevant and applicable legal framework may amount to a sufficient change in circumstances to trigger the application of that provision. Whether that proposition is correct, rather than merely arguable, is a question that will have to await a suitable case for its determination, as will the questions: (a) whether the procedural entitlement, should one exist, to have the credibility of the same statement assessed completely separately twice where it is relied upon for consecutive, rather than concurrent, claims to refugee status and subsidiary protection, makes it 'significantly more likely' that an applicant will qualify for the latter (see *PBN v MJE* [2016] IEHC 316 (Unreported, Faherty J, 2 June, 2016) applying *LH v MJELR* [2011] 3 IR 700); and (b) whether or not such an entitlement, should it exist, amounts to an element – specifically, an argument of law - that any applicant could have presented as part of his or her original application.

105. For the same reason, it is unnecessary to adjudicate on the narrow technical arguments relied upon by the Minister in opposition to the applicant's challenge to the decision at issue. Principal among those is the contention that the applicant is 'grossly' out of time to challenge the refusal to grant a declaration of entitlement to subsidiary protection. In support of that argument, the Minister relies on the refusal of leave decision of Mac Eochaidh J in *B.M. v MJE* [2014] IEHC 25 (Unreported, High Court, 21 January, 2014). In that case, in which the timeline of relevant events was very like that now at issue, the applicant had been refused refugee status in May 2008 and a declaration of entitlement to subsidiary protection in March 2012, at which point a deportation order was made against him. In December 2013, his solicitors wrote to the Minister seeking the revocation of the decision to refuse subsidiary protection because of unspecified 'infirmities' attached to that decision 'in the light of subsequent CJEU and domestic jurisprudence', elsewhere identified as the judgment of the CJEU in Case C-277/11 (22 November 2012) and that of Hogan J in M.M. (No. 3) (23 January 2013). That request was refused by letter dated 19 December 2013. The applicant sought leave to challenge that decision on the ground, amongst others, that the Minister erred in failing to have regard to those 'infirmities.' In refusing leave, Mac Eochaidh J addressed that point in the following way:

> 'This ground must fail because no explanation has been provided why, (notwithstanding the fact that the judgment of the Court of Justice in M.M. is dated November 2012, and the judgment of the Irish High Court is dated January 2013) complaint is made for the first time almost 12 months later in respect of matters which should have been readily apparent to the applicant at least since the decision of the [CJEU] in M.M. if not before then, given that the complaints which were agitated in that case were well known to practitioners of asylum law in Ireland.'

106. Of course, in the present case both leave to seek judicial review and an extension of time for that purpose have already been granted by Order of Stewart J made on 16 February 2016, albeit in response to an application for each made ex parte. Yet it does appear that no explanation has ever been provided for the applicant's failure to raise the issue of 'a relevant and material change in the applicable legal framework' until, by letter dated 19 November 2013, the applicant's solicitor sought the revocation of the deportation order made against the applicant on 7 February 2011 and the reconsideration of the applicant's claim for subsidiary protection on that basis.

107. In seeking to surmount that difficulty, the applicant invokes the observation of Mac Eochaidh J in *K.B v MJELR* [2014] 2 IR 462 (at 470) that the Court, which granted an extension of time to seek leave in that case, would have been extremely reluctant to entertain an application to dismiss the proceedings four years after they had been instituted where the first indication of a complaint about delay was in written submissions filed the day before trial. In the present case, the timeline is significantly different. Leave was granted ex parte on 16 February 2016 and, while, unaccountably, no issue of delay is raised in the Statement of Opposition, dated 7 November 2016, the issue was raised not long afterwards in the written submissions of the Minister, dated 15 February 2017 and filed on 17 February 2017, in response to the written submissions of the applicant, dated 14 February 2017.

108. It is not easy to see how the very close similarity between the relevant sequence of events in this case and that in B.M. would not impel the same result i.e. the rejection of the applicant's claim on that basis. However, for the reasons I have already given, it is unnecessary to decide the point.

109. There is one final point, raised by the applicant, that does require to be determined. It is whether the Minister applied the wrong test to the applicant's request for readmission to the asylum process, namely the test prescribed by law under s. 17(7E) of the 1996 Act, as amended, in asserted breach of an undertaking that the Minister had given to the applicant as part of the compromise of the earlier judicial review proceedings to consider the said request on some other, agreed basis. The applicant failed to adduce any evidence of the terms of the said compromise or of the alleged undertaking. It was never made clear in argument on what basis other than that prescribed by law it was being suggested the applicant's request for readmission to the protection process should have been considered. It follows that this ground also must fail.

Conclusion

110. For the reasons already given, the application must be dismissed. I will hear the parties in relation to the appropriate consequential orders.