THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1007 J.R.]

BETWEEN

IYIKOREOLUWA IYINKE AFOLABI AND JOHN ADEDAPO AFOLABI (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND) AND ELIZABETH ADERINSOLA AFOLABI (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND) AND SAMUEL ADEMIDUN AFOLABI (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND IYIKOREOLUWA IYINKE AFOLABI)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke dated the 17th day of May 2012

1. The applicants in this matter are a mother and her three minor children, the youngest of whom, Samuel, the fourth named applicant, was born in the State shortly after the arrival here of his mother and siblings in 2007. They are all nationals of Nigeria whose applications for asylum in the State have been refused. In this proceeding they seek leave to apply for judicial review of decisions made by the first named respondent ("the Minister") refusing applications for subsidiary protection and making deportation orders in respect of them.

2. At the outset of the hearing, two preliminary applications were made to the Court, which the Court declined. Before indicating the reasons why the applications were declined it is useful to summarise the general context and family circumstances in which the proceedings are taken.

3. The first named applicant, the mother, was born in Lagos, Nigeria. In 1998 she married her husband who worked in the oil industry and they moved to Port Harcourt in the Niger Delta in December 2006. She was 39 years old when the contested decisions were made. The second named applicant, the eldest son, was born in March 1998, and his sister the third named applicant was born in 2001.

4. The claim for asylum and the applications for subsidiary protection were essentially based upon a series of incidents which the mother claims happened in March 2007. Four men whom she described as foreign oil workers who worked with her husband, called to the family house claiming that militants were pursuing them to kidnap them. The militants arrived looking for the four, but they did not find them because they had been hidden by her husband. They returned some days later claiming to have been told that her husband had been seen taking the four men out of the house. They demanded the amount of the ransom they had placed on the heads of the men in question and gave the husband one week to pay it. The matter was reported to the police. The militants later returned fully armed and the matter was again reported to the police. No action was taken by the police. She claimed that the militants kidnapped her husband and her first born son and that she has not heard of either of them since. She claims that the militants beat and raped her.

5. In an appeal decision of the 30th August, 2010, the Refugee Appeals Tribunal rejected the application for asylum on behalf of the applicants essentially upon the ground that it was not believed "that she ever had the difficulties she alleges in her country of origin or has any fear of returning there as she claims". Discrepancies and inconsistencies were identified in her account of the happenings in question and her attempts to explain the discrepancies were considered unacceptable.

6. On 10th October 2010 and supplemented by additional submissions on 3rd May 2011, an application was made for subsidiary protection on behalf of the mother and the two older children and on the same dates representations and supplemental submissions by way of application for leave to remain under s. 3 of the Immigration Act 1999, were made on their behalf

7. On the 7th October, 2010, a separate application for subsidiary protection was made on behalf of Samuel together with representations by way of application for leave to remain under s. 3 of the Act of 1999. These representations were later supplemented by additional country of origin information submitted with letters dated the 4th May, 2011.

8. The two applications for subsidiary protection were refused in separate determinations furnished to the applicants by letters dated 08/06/2011 to which a memorandum entitled "Determination of Application" was attached in each case setting out the analysis made of the applications and the reasons for the refusal. Correspondingly, the deportation orders each dated the 27th September, 2011, were made in respect of the applicants and communicated to the mother and older children by a letter of the 4th October, 2011, and to Samuel by separate letter of the same date. Each letter was accompanied by the deportation orders in question, together with a memorandum entitled "Examination of File under s. 3 of the Immigration Act 1999, as amended" setting out in each case the assessment made and the reasons for refusing leave to remain. These are the decisions which are the subject of the applications for judicial review.

9. As mentioned, at the outset of the hearing, two applications were made to the Court, the first of which was an application that the Court should decline to hear the case and that it be remitted to another judge. This application was based upon the fact that this Court had heard and refused an application for an interlocutory injunction restraining deportation of the applicants on the 12th and 13th December, 2011. Counsel for the applicants Mr. Paul O'Shea, submitted that it would be inappropriate in these circumstances for the Court to proceed to deal with the leave application and relied upon the judgment of Hedigan J. in *E.P.I. v Minister for Justice* [2009] 2 I.R. 254, in support of the proposition that there was a substantial basis for a reasonable perception that the grounds upon which the applicant brought their case had been the subject of an adjudication by the same judge in refusing interlocutory relief. Because Mr. O'Shea had made a similar application in analogous circumstances in another case a week earlier, the Court took the

precaution of consulting its notes on the interlocutory hearing in the present case and was satisfied that this was not an instance in which the Court should recuse itself. In the earlier case the Court had acceded to Mr. O'Shea's request because it accepted that its refusal of the interlocutory injunction in that case had involved a ruling on the question as to whether there was a fair issue to be tried at the leave application. In the present case, on the other hand, the Court was satisfied that it had not expressed any definitive view, but had refused the injunction because it was not satisfied that there was before it evidence that the possible deportation of the applicants prior to the hearing carried any real risk of the applicants being exposed to a risk of serious harm or other irreversible change of circumstance which would justify the Court in intervening to interrupt the otherwise normal course of a statutory procedure which was *prima facie* lawful.

10. The principles which the Court should apply to an application to recuse in these circumstances are well summarised by Hedigan J. in the *E.P.I.* judgment and this Court gladly adopts the summary. Essentially, it is a matter of balancing in the circumstances of the particular proceedings a number of potentially divergent interests. On the one hand, it can be in the interest of efficiency in the administration of justice and saving time and expense for the parties that a judge who has dealt with an interlocutory application and is therefore familiar with the case and with the pleadings and documents involved, should proceed to deal with the substantive hearing. Where, however, the adjudication of the issues raised at the interlocutory application involved reaching conclusions, even provisional conclusions, the Court must bear in mind the risk of a reasonable apprehension or perception of bias arising if the same judge proceeds to hear the substantive litigation. In balancing these interests, the Court must also be careful not to acquiesce in applications which might be perceived as attempts by a litigant to choose a more favourable forum. This, in the view of the Court, is a particular consideration in the High Court asylum list where very large numbers of cases await hearing and there are rarely more than two judges available to hear them.

11. For these reasons, therefore, the Court declined the request that it recuse itself.

12. The second application was for an amendment of the statement of grounds to include an additional relief and a new ground. The additional relief was that of a declaration that s. 3(1) of the Immigration Act 1999, "insofar as it requires the respondent when making a deportation order to regard such order indefinite and therefore lifelong, is disproportionate such that it is unconstitutional and/or incompatible with the European Convention on Human Rights".

13. Notice of this application to amend had not been given to the respondent other than by a letter dated Friday the 27th April, 2010, and it was admitted that the initiative arose exclusively out of the delivery by Hogan J. of a judgment on the 26th April, 2012, in *Sivsivadze and Others v. Minister for Justice and Equality, Ireland and the Attorney General* [2012] IEHC 137. In that judgment Hogan J. had concluded that the applicants were entitled to be granted leave to apply for judicial review of a decision of the Minister under s. 3(11) of the Immigration Act 1999, refusing to revoke a deportation order made in respect of the fourth named applicant, a national of Georgia, on the basis of the principal ground advanced in the application to the effect that s. 3 of the Act of 1999 "is unconstitutional in that it imposed - in principle at least- a lifelong ban on the person to whom the deportation order was addressed". It had been contended that such a ban amounts to disproportionate interference with the applicants' right to family life under Article 41 of the Constitution and that a deportation order of indefinite duration violated the rights of the applicants to protection of family life under Article 8 of the European Convention on Human Rights.

14. This Court declined the application to amend the statement of grounds for this purpose for a number of reasons. In the first place, the Court considered that it would be manifestly unfair to the respondents to permit such an application to succeed when made for the first time informally by letter given a matter of days before the hearing of the case after papers had been lodged and written legal submissions exchanged. Secondly, the application to amend was not occasioned by any change of events or circumstances affecting the applicants themselves, but purely the happenstance of forensic inspiration provided to the legal representatives of the applicants by the intervention of the judgment of Hogan J.

15. Thirdly, the Court was of the view that it was in any event unnecessary to permit this issue to be litigated in the present proceeding. The Court was informed that since the interlocutory hearing in December last, the applicants have in fact been deported and are now back in Nigeria. Their circumstances are, accordingly, materially different from those of the family unit considered by Hogan J. in the above judgment. In that case the fourth named applicant had been deported to Georgia and had applied for revocation of the deportation order because it had the effect, it was claimed, of precluding him visiting his wife, the first named applicant and their two children in this country. As described in paragraphs 11 and 12 of that judgment, the first named applicant, although a failed asylum seeker, had been given humanitarian leave to remain in the State apparently upon the ground that she had been grievously abused by a family member in Georgia in the past, thus raising the implication that it would be impossible for the first named applicant and her children to visit the deportee in that country.

16. In the present case, on the other hand, the family group has been repatriated to Nigeria so that no separation or interference with the family as such arises. The basis upon which it is sought to challenge the constitutionality of the power to make a deportation order is that its indefinite character produces an effect which is disproportionate. As Hogan J. acknowledged in the above judgment, the power of the Minister to make a deportation order has to be considered, for this purpose, in the light of the ability of the Minister to revoke such an order under section 3(11).

17. As has been reiterated in the extensive case law of the Superior Courts in this jurisdiction, some of which has been referred to by Hogan J. in the judgment, it is an inherent entitlement of every sovereign State to decide who shall enter the State and upon what terms and conditions as regards duration and activity within the State permission to remain or reside may be granted. (See *inter alia, Pok Sun Shum v Ireland* [1986] ILRM 593, *Laurentiu v Minister for Justice* [1999] 4 IR 26, and *D.L. v Minister for Justice, Equality & Law Reform* [2003] 1 IR 124.

18. It necessarily follows, in the view of the Court that it must be competent and lawful for the Oireachtas to create and to confer upon a Minister or other authority the power to make decisions as to who may enter, remain and reside in the State and upon what terms and conditions. It must be equally competent for the Oireachtas to create and confer a power to deport persons who are illegally in the State and have no permission to enter, remain or reside. If the argument is that the power is unconstitutional or incompatible with the ECHR for a reason of proportionality it can only be the exercise of the power in a specific case which can give rise to disproportionality because of the circumstances in which the exercise of the power brings about a particular effect. Take a simple example. A third country national enters the State illegally using a false name and a stolen passport. He commits a serious crime and serves a term of imprisonment. At the end of the sentence he is ordered to be deported. It could not be suggested in the view of the Court that the indefinite duration of the order's effect rendered it invalid as disproportionate. The person in question never had any entitlement to be within the State. He has no family life within the State and no private life other than that in prison. His deportation deprives him of no right or and interferes with no entitlement the State is obliged to protect.

19. Proportionality as a facet of unreasonableness and a ground of invalidity in law of an administrative measure or decision involves a

finding that the effect on or consequence for, those affected by it clearly exceeds what is reasonably justifiable or necessary to secure the legislative objective or policy interest sought to be attained. In *Meadows v Minister for Justice* [2010] 2 I.R.701, Murray C.J. cited with approval a passage from the judgment of Keane J. (as he then was,) in *Radio Limerick One Ltd v I. R.T.C* [1997] 2 ILRM 1 at 20 in which he commented upon an article in a British journal arguing for the adoption of proportionality as a doctrine of administrative law in the United Kingdom: " Whatever view may be taken as to the desirability of that approach, it can be said with confidence that, in some cases at least, the disproportion between the gravity or otherwise of a breach of a condition attached to a statutory privilege and the permanent withdrawal of the privilege would be so gross as to render the revocation unreasonable within the *Wednesbury* or *Keegan* formulation". In other words, an administrative measure or decision may be unlawful as manifestly unreasonable if an administrative sledge-hammer is employed to crack a legislative or policy nut.

20. It must also be borne in mind that the power to make a deportation order conferred on the Minister by s. 3(1) is exercisable not only against failed asylum seekers but in respect of other categories of persons listed in subsection (2). Furthermore, deportation is not ordered as a sanction or punishment. It is the removal from the State of persons who have no permission to be present. In ordering deportation the Minister is restoring the position required by the Oireachtas in enacting s. 5 of the Immigration Act 2004 namely that no non-national should be in the State other than in accordance with a permission given by or on behalf of the Minister.

21. Except perhaps where deportation follows cancellation of a permission or visa previously granted, it does not involve the withdrawal of a statutory privilege. Where deportation follows failure of an application for international protection, unless it occurs in circumstances where the specific deportation has an impact on the deportee or on third parties and relationships between them, the deportation does not as such deprive the failed asylum seeker of a subsisting legal right to remain in the State.

22. Thus, the question of proportionality arises in the *Sivsivadze* case because of the impact of an indefinite exclusion from the State of the fourth named applicant in circumstances where he has a wife and children residing lawfully within the State. In the present case, however, there is no such factor and the question of proportionality of permanent exclusion could only arise, in the view of the Court, if one or more of the applicants applied to have the existing deportation orders revoked under section 3(11). In such event, the issue of disproportionality of the indefinite duration of the deportation order would fall to be considered in the light of the reasons put forward for revocation with a view to returning to the State on the one hand and the Minister's reasons for refusing to revoke on the other.

23. Thus, in the circumstances of the present case, the ground sought to be advanced in the amendment is, at this stage, primarily an academic issue from the point of view of the applicants. Having been deported and not having raised this issue in representations as to why the contested deportation orders ought not to have been made at the time, or put forward reasons as to why they might wish or need to return to the country at some future time, it is unnecessary for the Court to permit the matter to be litigated in the present proceeding. The applicants, if they so wish, clearly have *locus standi* to litigate by plenary action the issue of principle namely, whether all deportation orders made under s.3 (1) must always be unlawfully disproportionate because they must always be indefinite in duration when made. On the other hand, if the case they wish to make is that these deportation orders if indefinite will be disproportionate because of their impact upon their particular circumstances it is, in the view of the Court, only by applying for revocation under s. 3(11) and subsequently seeking to judicially review the reasons given for any refusal that the issue of the proportionality of a continuing exclusion can be examined. The indefinite character of the orders in the future can only be assessed as reasonable or proportionate by reference to the particular reasons relied upon in seeking permission to re-enter the State as against the reasons given and interests sought to be safeguarded if refused. For these reasons the Court refused the application to amend.

24. In the statement of grounds upon which the challenges sought to be made to the subsidiary protection determinations and the deportation orders are based, a total of fourteen grounds are set forth. Some of these relate to the subsidiary protection refusals; some to the deportation orders and some appear to be common to both. They do however, fall effectively into the two categories, namely, those that can be taken to be directed at the substantive content of the particular decisions on the one hand and those grounds which are directed at purely legal issues most of which have been, as Mr. O'Shea conceded, the subject of previous judgments of the High Court. The points to be made in the grounds can be summarised as follows:-

> Grounds 1, 2 and 3 are directed at the subsidiary protection Determinations and raise the proposition that the European Communities (Eligibility for Protection) Regulations 2006 fail to transpose correctly Article 4.1 of Directive 2004/83/EC by failing to require an application to be assessed "in cooperation with the applicant";
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> Grounds 5 and 6 are also directed at the subsidiary protection determinations and are based on the proposition that the absence of an appeal against the determinations deprives the applicant of an effective remedy as required by the Constitution, by Article 13 of the ECHR or Article 47 of the Charter of Fundamental Rights of the European Union and that it breaches the principle of equivalence and effectiveness in EU law;
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> Ground 12 is also directed at the subsidiary protection determinations and alleges that the "common law rules governing the remedy of judicial review" are contrary to Articles 34 and 40.3 of the Constitution because the inability of the applicants "to furnish new material" means that the remedy is "less than an effective remedy";
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> Ground 4 is directed at the deportation orders which are said to be invalid because they have not been signed personally by the Minister and because the Minister has not personally considered whether the *non refoulement* obligation of the State would be breached by the deportations;
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> Grounds 7, 8, 9, 13 and 14, on the other hand, are directed at the substance of the contested decisions and allege that the Minister has failed to have regard to the representations made, to the country of origin information consulted; and that material consulted was read selectively and conclusions reached were irrational or based on irrelevant considerations.
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> Ground 10 alleges that it was unlawful to make deportation orders in advance of the judgment by the Court of Justice of the European Union in case C- 175/11 *HID and AB v. Minister for Justice.*
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> Ground 11 alleges in general terms that the Minister failed to "give due weight to the best interests of the infant applicants".

25. The Court draws attention to the manner in which these many grounds fall into two categories as described above for the following reason. Judicial review is the administrative law procedure whereby the High Court supervises the validity and lawfulness of decisions taken and measures adopted by public authorities on foot of powers delegated to them by legislation. The remedies available under O. 84 of the Rules of the Superior Courts in this procedure are discretionary, including, (at least in matters of a non-criminal character) the remedy of *certiorari*. Furthermore, while O. 84 permits issues to be litigated on the basis of claims for

declaratory reliefs, the primary concern of the High Court in exercising its jurisdiction in judicial review is that of ensuring that such powers have been validly exercised; that such decisions when impugned have been lawfully arrived at and are not manifestly unreasonable including disproportionate. This is a particular concern for matters in the asylum list where decisions refusing international protection or ordering deportation have direct effect upon the personal and family circumstances of applicants. When presented with challenges to decisions adopted in this area therefore, the primary function of the Court is to decide whether the impugned decisions have been validly reached in accordance with the statutory terms governing the statutory process such that they may be given lawful effect when implemented. Where in a judicial review proceeding, issues of a general nature are sought to be litigated upon the basis of claims for declaratory relief, the Court has a discretion not to entertain the claims if a successful outcome will not necessarily lead to the quashing of a contested decision but to leave such an applicant to the alternative remedy by plenary action. (See for example the judgments of the Supreme Court in *Gilligan v Ireland* [2000] 4 I.R 579 and of Finnegan J. in the High Court in *Maguire v South Eastern Health Board*, [2001] 3 IR 26.)

26. For this reason the Court considers, first, that it is neither necessary nor appropriate to grant leave in this case on the basis of the "cooperation" issue canvassed in grounds 1, 2 and 3 as indicated above. These arguments have been rejected in a number of judgments of the High Court including *Ahmed v. Minister Justice* (Unreported, High Court, Birmingham J. 24th March 2011), *I.M. v. Minister for Justice* (Unreported, High Court, Cooke J. 27th July, 2011) and *B.J.S.A. (Sierra Leone) v. Minister for Justice* (Unreported, High Court, Cooke .J. 12th October, 2011). The point is also the subject of the judgment of Hogan J. of 18th May, 2011, and the 5th September, 2011, in *M.M. v. Minister for Justice*, arising from which, having rejected the argument, a reference was made for preliminary ruling to the Court of Justice of the European Union. In that case the opinion of the Advocate General was handed down on the 26th April, 2012. While the judgment of the Court of Justice is outstanding, this Court is satisfied that there is now no substantial ground for contending that Article 4.1 of the Qualifications Directive has been incorrectly or inadequately transposed. Where "cooperation" has been accorded in the asylum process through the s. 11 Interview and an oral hearing on appeal before the Tribunal, the only residual element of cooperation in the subsidiary protection stage is that covered by the general principle of *audi alterem partem* and in this case, save insofar as it is an element in the arguments as to the alleged inadequate assessment of representations dealt with below, no attempt has been made to identify any particular point, issue, fact or argument in respect of which it could be said that there has been a failure on the part of the Minister to hear the applicants. It must also be pointed out that in dealing with an application for subsidiary protection the Minister is not adjudicating on an adversarial dispute between parties and doing so in reliance on information provided by one behind the back of another. He is deciding on an application made by an applicant who claims to satisfy certain conditions to qualify for a particular status. The applicant's primary entitlement to be heard is in the application the applicant makes. It is only in circumstances where the Minister proposes to rely on some fact or information unknown and unavailable to the applicant and which contradicts or negates some material element upon which the applicant has based the application that the principle of *audi alteram partem* may become applicable.

27. For similar reasons, the Court is equally satisfied that there is no substantial ground or arguable case for granting leave on foot of the "effective remedy" and "absence of appeal" arguments sought to be advanced under the headings of grounds 5, 6, 10 and 12. These issues have been considered and rejected in various judgments of the High Court including notably the judgments of this Court in *Akhile v Minister for Justice* (Unreported, High Court, 12th October, 2011), *S.L. (Nigeria) v. Minister for Justice* (Unreported, High Court, 6th October, 2011) and *Chigaru v. Minister for Justice* (Unreported, High Court, 19th April, 2012).

28. Of the grounds raising general issues of law, there remains No.4 in which two arguments are sought to be made namely that the deportation orders have not been signed personally by the first named respondent and secondly, that the Minister has not personally addressed the issue as to whether the *non refoulement* prohibition in s. 5 of the Refugee Act 1996, is applicable in these cases. The first limb of this ground has been considered by Hogan J. in a judgment of the 2nd November, 2011, in *LAJ & Ors v. Minister for Justice*, in which he concluded in para. 15 and 16 as follows:

> "(15) While I accept that the decision to deport is often a complex one which has significant implications for the individual who is the subject matter of the order, I am not satisfied that it is of such intrinsic importance to the community at large that the decision can be made only by the Minister personally. It must also be recalled that the Minister for Justice has many onerous obligations. It cannot be suggested that the Oireachtas must have intended that he alone should personally take the decision to deport a given individual in every single case, since this would mean that he had responsibility for potentially hundreds of such decisions in any given year.
>
> (16) It follows, therefore, that this is also a case governed by *Carltona* principles and that the nominated civil servant remains free to make the decision in question."

29- The challenge to the deportation orders is governed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, so that a substantial ground for the grant of leave must be shown. The ground must, in the words of Carroll J. in *McNamara v. An Bord Pleanala* [1995] 2 I.L.R.M. 125, be "arguable, weighty and must not be trivial or tenuous". She added: "A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial". That is the position in relation to the first limb of this ground having regard to the above judgment of Hogan J.

30. Counsel for the applicants, on the other hand, argues that a distinct issue arises in relation to the prohibition of *refoulement* under section 5. Relying particularly upon the judgment of Murray C.J. in the *Meadows* case above, he submits that the decision to be taken under section 5 is arguably a personal one restricted to the Minister. He points particularly to the passage in which Murray C.J refers to the Minister's position when he has before him factual material suggesting that deportation would expose the individual concerned to one of the risks referred to in section 5:

> "On the other hand if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the Minister must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum, at the initial or appeal stages, and their conclusions or views may be before the Minister but it remains at this stage for the Minister and the Minister alone in the light of all the material before him to form an opinion in accordance with s. 5 as to the nature or extent of the risk, if any, to which a proposed deportee might be exposed. This position is underscored by the fact that s. 3 envisages that a proposed deportee be given an opportunity to make submissions directly to the Minister on his proposal to make a deportation order at that stage. The fact that certain decisions have been made by officers at an earlier stage in the course of the application for refugee status does not absolve him from making that decision himself."

31. While this passage does not, as counsel for the Minister argues, exclude the application of the *Carltona* principle, the issue which is raised is undecided and clearly of considerable importance, particularly in view of the recent apparent change in practice within the Department to delegate to his officers entirely the functions of analysis and assessment, the formulation of the recommendations in the "Examination of File" note, the approval of deportation and the formal signing and sealing of the deportation order. There is thus

no personal involvement on the part of the Minister in any aspect of the deportation process under s. 3 of the 1999 Act, in these cases. The present deportation orders are stamped "Deportation Approved" by, it would appear, the "Runai Aire" or Secretary of the Department. Having regard to the emphasis laid by Murray C.J. upon the statement that it is for "the Minister alone" to form the opinion required by s. 5, the Court is satisfied that leave should be granted to seek judicial review of these deportation orders on this issue.

32. The Court is satisfied however that no arguable case or substantial ground is raised under any of the other headings which would warrant the grant of leave to apply to quash the subsidiary protection determinations or the deportation orders. An examination of the determinations and of the "Examination of File" memoranda in each case clearly demonstrates that the decision makers have considered both the submissions and representations on behalf of the applicants and the various statutory headings which are required to be taken into account under the 2006 Regulations and s. 3 of the Immigration Act 1999. Where country of origin information has been consulted there is no basis, in the view of the Court, for questioning it as having been chosen selectively in the sense of having been assembled in a way which is directed against the applicants. The Court is also satisfied that the various conclusions reached are demonstrably based on the information before the decision makers and cannot be said to be either irrational or unreasonable.

33. The central argument advanced on behalf of the applicants in relation to the subsidiary protection determinations is directed at the manner in which the decision makers dismissed the claim that the first named applicant had been subjected to past serious harm. It is submitted that the Minister failed to apply correctly the requirements of Regulation 5(3) which provides that "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 ...". It is submitted that the Minister has merely rejected the first named applicant's credibility in general terms without considering whether she did in fact suffer serious harm. It is said that the Minister was obliged to investigate further and not rely simply upon the absence of corroborating documentary evidence.

34. In the judgment of the Court, this is a misreading of the determination and an over-simplification of the actual position in the case. As pointed out in para. 4, the first named applicant's entire case rested on her account of the events said to have happened in March 2007. It is not disputed that no corroborative evidence even of an indirect nature was ever sought to be put forward. Even if the specific attacks by the militants and attempted kidnappings could not be traced in any newspaper reports or elsewhere, it is, at the very least, curious that the name of the oil company for which the husband and his expatriate co-workers were employed does not appear to have been mentioned and no attempt made to establish its existence. If the names of the expatriates in question are known it does not seem unrealistic to suggest that some corroboration of their existence and employment might possibly have been forthcoming. The applicants' claim was based exclusively on the word of the first named applicant and that had been found not believable.

35. Thus, when the question "Has the applicant already been subjected to serious harm?" is addressed in the determination, the response given by the Minster is factually correct:

> "The applicant states that her fear for herself and her children is from the militants whom she states kidnapped her husband and first born child and raped her. No evidence has been provided to substantiate her claim."

36. It is submitted that the Minister made no attempt to consider the additional elements listed as conditions in Regulation 5(3) which can justify the acceptance of an applicant's credibility, even where documentary or evidential support is not forthcoming. It is to be noted, however, that these conditions (a) - (e) are cumulative and include:-

> "(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; and
>
> (e) The general credibility of the applicant has been established."

37. It is clear from the analysis made under the headings of Regulation 5 that these conditions were clearly not met. Her statements were not found to be coherent or plausible and she clearly failed to establish her general credibility having admitted to providing false information at an early stage of the asylum process and changing her account of her travel to the State. In the judgment of the Court it is clear that it was reasonable and rational for the decision makers to discount the credibility of the events upon which the claim was based and not to accord her the benefit of the doubt.

38. For all of these reasons the Court is satisfied that the decisions sought to be challenged have been validly reached and are sound in substance, so tar as the contents of the decisions are concerned. For these reasons leave will be granted to apply for judicial review of the deportation orders only and upon the sole ground that they are invalid "by reason of the first named respondent not having personally considered whether the State's non-*refoulement* obligations would be breached by the deportation of the applicants".