**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 279 J.R.]**

**BETWEEN**

**P.C.**

**APPLICANT**

**AND**

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENTS**

**JUDGMENT of Mr Justice David Keane delivered on the 8th March 2017**

**Introduction**

1. On 30 May 2016, Mac Eochaidh J gave the applicant leave to apply for certain reliefs, including an Order of *certiorari* quashing the proposal by the Minister for Justice and Equality ('the Minister') to make a deportation order against him. The Minister notified the applicant in writing of that proposal, by letter dated 7 April 2016, pursuant to s. 3, sub-s. 3(a) of the Immigration Act 1999 ('the 1999 Act').

2. The real subject of the challenge – or, as the applicant puts it, the decision around which the central issues in the proceedings revolve – is the earlier one of the International Protection Appeals Tribunal ('the Tribunal'), then the Refugee Appeals Tribunal, to deem the applicant's appeal against the refusal of a subsidiary protection declaration to be withdrawn, pursuant to reg. 9 (2) of the European Union (Subsidiary Protection) Regulations 2013 ('the 2013 Regulations'). The Tribunal communicated that decision to the applicant in a letter dated 25 February 2016. The applicant seeks an Order of *certiorari* quashing the Tribunal's decision; an injunction restraining the Minister from acting on it; and an injunction directing the Tribunal to consider the applicant's appeal.

3. At the time when leave was granted, the International Protection Appeals Tribunal was known as the Refugee Appeals Tribunal. When s. 71(5) of the International Protection Act 2015 came into force on 31 December 2016, the former was substituted for the latter in these proceedings by operation of law.

**Regulation 9 (2) of the 2013 Regulations**

4. Regulation 9 of the 2013 Regulations deals with the withdrawal and deemed withdrawal of an appeal to the Tribunal against a recommendation that a person should not be declared eligible for subsidiary protection. Regulation 9 (2) states:

> 'Where an applicant fails, without reasonable cause, to attend an oral hearing under Regulation 8, then, unless the applicant, not later than 3 working days from the date fixed under that Regulation for the oral hearing, furnishes the Tribunal with an explanation for not attending the hearing which the Tribunal considers reasonable in the circumstances his or her appeal shall be deemed withdrawn.'

**Background**

5. The applicant gave an account of his personal history in the affidavit that he swore on 4 May 2015 to ground the present application. A copy of the recommendation and report of the Refugee Applications Commissioner ('the Commissioner'), dated 3 July 2014, on his subsidiary protection declaration application is exhibited to that affidavit. From the applicant's averments and the contents of that report, the following narrative emerges.

6. The applicant was born in 1987. Together with his parents and sister, he came to Ireland from Kosovo to escape the war that occurred there in 1999. Under the arrangements then prevailing, while the applicant and his family were not granted refugee status, the applicant's father was given a work permit. The applicant and his family returned to Kosovo in 2001. In January 2003, the applicant's father returned to Ireland on a work permit. The applicant's mother and sister were permitted to join the applicant's father in March 2007, after the latter's successful application for family reunification with them. A similar application in respect of the applicant failed because he had attained his majority. The applicant's parents have each since become naturalised citizens of Ireland.

7. While living alone in the family's badly damaged home in Kosovo between March and September 2007, the applicant was threatened numerous times by criminals who believed that he must have money as his family were living abroad. The applicant was threatened with a gun and robbed. The police were unable to assist as the robbers were masked and could not be identified.

8. The applicant entered the State again on a one month visa in September 2007 and applied for refugee status in January 2008. After the refusal of that application in September 2008, the applicant sought a declaration of entitlement to subsidiary protection. That application was refused on 3 July 2015. The Commissioner found the applicant's claim to be credible concerning past events but did not accept that those events amounted to serious harm or that substantial grounds had been shown for believing that the applicant would face a real risk of suffering serious harm if returned to Kosovo.

**The appeal**

9. The applicant appealed against that decision on 1 August 2014. He attended before the Tribunal in person on a date in June and was given an adjournment to obtain legal representation. The applicant avers that his present legal representatives wrote to the Tribunal on 22 July, enclosing a letter of authority (from him for them to act on his behalf), although he does not exhibit that correspondence.

10. The Tribunal wrote to the applicant's solicitors on the same date, notifying them that the applicant's appeal would be the subject of an oral hearing on 30 July and stating: 'You should note that if your client fails to attend, without reasonable cause, at the

appointed time your client's appeal will be deemed to be withdrawn.'

11. In circumstances that are not entirely clear, that hearing did not proceed on 30 July. Instead, on 29 July, the Tribunal wrote to the applicant's solicitors notifying them that the oral hearing of the applicant's appeal would take place on 19 August, and including the same warning about the consequences of any failure by the applicant to attend without reasonable cause.

12. Over two weeks later and just two days prior to the scheduled hearing, the applicant's solicitors wrote by e-mail to inform the Tribunal that the applicant did not wish to have an oral hearing, and instead wished to have his appeal considered on the papers only. That e-mailed letter went on to state that the applicant's solicitors intended to lodge further written submissions on behalf of the applicant by close of business on the following day, that is, on the day prior to the hearing. The applicant avers his solicitors received a reply to that e-mail later the same day, postponing the hearing, although he does not exhibit that reply.

13. The applicant's solicitors e-mailed a 15-page written submission to the Tribunal the next day. One of the paragraphs in that submission, under the heading 'procedural background', contains the following statement:

> 'The Subsidiary Protection Report which is the subject matter of this appeal, accepts the account given by the Appellant as being credible and for this reason the appellant has sought to have his appeal dealt with by way of written appeal in circumstances in which he will not be required to assist the Tribunal by way of oral evidence in circumstances in which the account he has given as to the basis of his claim is not a matter of any controversy.'

14. The next piece of correspondence exhibited is a letter dated 13 November from the Tribunal to the applicant's solicitors. It refers to the reason given in the applicant's written submission for the withdrawal of his request for an oral hearing, before continuing:

> 'It is not the case that the Tribunal is bound by [the Commissioner's] credibility findings. The Tribunal has issues as to credibility including inter alia the discrepancy between the case now advanced and the [applicant's] replies in the course of his asylum Section 11 interview when questioned on the subject of his fears, if any, on return and if he had ever been targeted by any person or group in Kosovo.
>
> The Tribunal considers that it is in the best interests of justice that these issues be explored with the [applicant] in person and that, without prejudice to the Tribunal's ultimate finding, that the question of internal relocation be dealt with at oral hearing also.
>
> The Tribunal is advising both the [applicant] and [the Commissioner] accordingly and will request that the case be rescheduled for oral hearing.'

Under s. 11 sub-s. 2 of the Refugee Act 1996 ('the 1996 Act'), as amended, the Commissioner directs an authorised officer to interview an applicant for refugee status and, having done so, the officer concerned furnishes a report in writing to the Commissioner concerning the application.

15. The applicant's solicitors replied on 17 November, requesting a copy of the asylum application papers, including the s. 11 interview report referred to, and adding that some time would be necessary to consider them. The applicant's solicitors wrote again on 15 December, stating:

> 'We note the discrepancy between the case now advanced and the replies in the course of [the applicant's] asylum Section 11 interview when questioned about his fears, if any, upon return and if he had ever been targeted by any person or group in Kosovo.
>
> Our client instructs [us], he suffered terribly in Kosovo and did not mention the attacks during the course of his Section 11 interview in 2008, as in his own words [he] "did not have the strength to talk about it." Our client instructs us that he was suffering from bad bouts of depression and severe panic attacks during this time.
>
> Our client has been diagnosed as suffering from post-traumatic stress disorder. We enclose herewith a letter from Dr. Domhnall Kavanagh dated the 14th December 2015 confirming our client's diagnosis.
>
> Our client also instructs us that he does not wish to attend for oral hearing and confirms the position as set out in our correspondence of 18th of August last is how he wishes to proceed with his appeal.'

16. Dr. Domhnall Kavanagh appears to be a general practitioner. In his short letter, he does not state how long the applicant has been his patient or, indeed, that the applicant is his patient, nor does he disclose when, or if, he examined the applicant. He simply states:

> 'The [applicant] suffers from post-traumatic stress disorder as a result of repeated physical attacks which he suffered in his home country, Kosova (sic).
>
> He has taken amitriptyline in the past for same.'

There is nothing in the said letter concerning the effect of the applicant's condition on his ability to attend, or give evidence at, his appeal hearing, nor is any detail provided concerning the ongoing treatment, if any, of the applicant or his prognosis for recovery. In ascribing the applicant's condition to 'repeated physical attacks which he suffered in his home country', it has not been suggested that Dr Kavanagh was doing anything other than relaying the applicant's own more recent narrative. In short, the letter provides rather less information than a typical medical certificate. And, unlike a medical certificate, it does not purport to suggest that the applicant is unfit to attend the Tribunal.

17. The Tribunal wrote once again to the applicant's solicitors on 2 February 2016, notifying them that an oral hearing of the applicant's appeal was scheduled for 17 February, before stating for the third time: 'You should note that if your client fails to attend, without reasonable cause, at the appointed time your client's appeal will be deemed to be withdrawn.'

18. The applicant's solicitors replied in a letter that was e-mailed on 11 February. They reiterated that the applicant did not wish to attend for oral hearing and would not be doing so. They also reiterated that the applicant wished for his appeal to be decided 'on the papers' and sought confirmation that it would proceed in that way. They stated:

> 'Our client instructs us that he does not wish to increase his anxiety by attending for oral hearing and having to recount the ill treatment he was subjected to prior to his departure from Kosovo.
>
> … he would prefer not to attend in person as he believes attendance would be sufficiently (sic) stressful and may have an adverse effect on his health given his diagnosis.'

19. The Tribunal wrote back on 12 February. It referred the applicant's solicitors to the terms of its earlier letters of 'the 17th December and the 13th November last.' There is no letter of 17 December 2015 in the papers before the court. The Tribunal reiterated its position that an oral hearing should proceed 'for the reasons given.' The letter then continued:

> 'It is not uncommon for appellants to have suffered trauma and this is always taken into account. However the Tribunal reserves the right to assess how a case should be processed in the best interest (sic) of justice. As previously indicated, the contents of the letter from your client's doctor of the 14th December last are noted and again, as previously stated, the appellant's sensitivity will be taken into account.
>
> It is noted that the appellant through his solicitors originally opted for an oral hearing and that he expressed no difficulty in principle in so proceeding when the case was listed for hearing last June and he attended at the Tribunal for hearing. The matter was adjourned on the application of the applicant of the appellant at the suggestion of the Tribunal Member and the agreement of the Presenting Officer only because the appellant's original solicitor was not attending and the appellant had stated he was actively seeking other representation. The appellant also spoke about criminals allegedly threatening him at his 2014 Section 11 [subsidiary protection] interview.
>
> The oral hearing will proceed as scheduled on the 17th February next.'

20. The applicant's solicitors replied by letter dated 16 February, confirming that their client's position remained as set out in their letter of the 11th, before stating:

> 'The position of the Applicant is that he wishes the matter to be dealt with on the papers, and that he feels he would not be able to cope with the stress given his condition.
>
> While it is appreciated that regard will be had to the Applicant's position in this respect, it is however, the cross-examination that the Applicant has particular concern about. This is a feature that was not expected to be an issue at the interview, which the Applicant nevertheless found very stressful.
>
> Accordingly, the Applicant will not be attending the Tribunal for oral hearing on 17th of February 2016.'

21. The Tribunal responded to that letter on the same day, stating that its position remained as set out in its letters of 12 February, 17 December and 13 November, and that the hearing would be proceeding as scheduled on the following day. In a further e-mailed letter on the day of the hearing, the next day, the applicant's solicitors noted that neither the Tribunal's position nor that of their own client had changed, before yet again repeating their request that the appeal be dealt with on the papers only.

**The challenged decision**

22. On 25 February 2016, the Tribunal wrote separately to the applicant and his solicitors. In its letter to his solicitors, it stated:

> 'I refer to the Notice of Appeal submitted by your above named client against the recommendation of the [Commissioner] on 01/08/2014, and to subsequent correspondence.
>
> In our letter of the 2nd of February last we advised your office, and your client by separate letter, that should the appellant fail, without reasonable cause, to attend the scheduled oral hearing their appeal would be deemed to be withdrawn. Your client failed, without reasonable cause, to attend the hearing on 17 February 2016 and no subsequent explanation has been received. Therefore pursuant to Regulation 9 (2) of the [2013 Regulations] this appeal is deemed to be withdrawn.'

**Preliminary issues**

23. In the written submissions filed on his behalf, the applicant acknowledges that the 'primary question' he raises concerns the lawfulness of the Tribunal's decision of 25 February 2016 to deem his subsidiary protection refusal appeal to be withdrawn. If that decision falls, then it would seem to follow that the Minister's proposal to deport the applicant, notified to the applicant by letter dated 7 April 2016, cannot stand.

24. But, quite apart from his challenge to the Tribunal's decision, the applicant raises three other discrete issues concerning his entitlement to an Order quashing the Minister's proposal to deport him.

25. First, the applicant submits that the proposal was made prior to the expiration of the period available to him for seeking an 'effective remedy' in respect of his subsidiary protection application in breach of the requirements of Council Directive 2005/85/EC of 1st December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status application ('the Procedures Directive'). The applicant did not seek to explain or develop this point beyond referring the court to the following statement in the letter before action that his solicitors wrote on 27 April 2008:

> 'In particular, we would submit that given the decisions from the TJEU (sic) and the High Court in HID & BA, the High Court (on judicial review) is effectively part of the effective remedy for the purposes of EU law, in respect of international protection decisions, and therefore, our client is in the international protection process pending the resolution of the judicial review proceedings challenging the Minister's decision.'

26. Article 39 of the Procedures Directive deals with the right to an effective remedy before a court or tribunal against certain asylum application decisions. The applicant's argument in this respect appears to be that the Procedures Directive applies to subsidiary protection applications as it does to asylum applications and that, in order to avail of an effective remedy against an adverse decision on subsidiary protection, an applicant must be enabled not only to appeal it to the Tribunal, but also to judicially review any failure by the Tribunal to overturn it, with the result that an applicant remains within the subsidiary protection process (and, in consequence,

immune from the formulation of a proposal to deport him or her) until the time limit for seeking judicial review of the relevant Tribunal decision has expired. While it is by no means clear to me that the decision of Cooke J. in *H.I.D. & Anor v Refugee Appeals Tribunal* [2011] IEHC 33 goes anything like so far (in observing, at §47, 'that the availability of judicial review is not wholly irrelevant to the concept of an effective remedy'), it is not necessary to decide the point, since I am now dealing with the applicant's challenge to the decision of the Tribunal on his appeal.

27. Second, the applicant contends that having obtained a stay on the determination of the Minister's proposal to make a deportation order against him, as part of his application *ex parte* for leave to seek judicial review of that proposal, he is entitled to the substantive relief he now seeks because the respondents' failure to apply to have that stay discharged in the interim amounts to a form of acquiescence or waiver on the part of the respondents. That argument is unstateable. The threshold test that must be passed to obtain interim or interlocutory relief is markedly lower than that which applies to the resolution of an application for substantive relief. A failure to contest the grant of the former relief, or to seek to apply to have the Order granting it discharged, cannot amount to a concession of any entitlement to the latter.

28. Third, the applicant asserts that he is entitled to the Order that he seeks on the discrete ground that the respondents failed to swear and file a verifying affidavit in support of their statement of opposition within the time permitted under the rules. There seems to have been some miscommunication between the parties on this issue because, although in his written submissions, dated 23 January 2017, the applicant makes the point that no verifying affidavit has been sworn, the book of papers presented by the applicant for the use of the court at the hearing includes an affidavit of verification sworn on behalf of the respondents on 16 December 2016.

29. Order 84, rule 22 (4) of the Rules of the Superior Courts 1986, as amended ('the RSC'), states:

> 'Any respondent who intends to oppose the application for judicial review by way of motion on notice shall within three weeks of service of the notice on the respondent concerned or such other period as the Court may direct file in the Central Office a statement setting out the grounds for such opposition and, if any facts are relied on therein, an affidavit, in Form No. 14 in Appendix T, verifying such facts, and serve a copy of that statement and affidavit (if any) on all parties. The statement shall include the name and registered place of business of the respondent's solicitor (if any).'

30. It is not clear from the papers before me precisely when the applicant's notice of motion (which is dated 13 June 2016, and returnable on its face to 20 June 2016) was served on the respondents. Nor is it clear whether the respondents sought or were given a longer period to file their opposition papers than the prescribed three weeks from the date of service of the motion papers upon them. While a necessary requirement in this case, as in any other application under O. 84, r. 18 of the RSC, the respondents' verifying affidavit is a two-paragraph pro forma document. No argument has been put forward that whatever late filing there may have been of the statement of opposition or of the respondents' verifying affidavit has caused any prejudice to the applicant. Counsel for the applicant acknowledges that this objection amounts to a pleading point, though stresses that it is one that the applicant is entitled to rely upon. In the absence of any identified prejudice, I am disposed to extend the time for the filing and service of the respondents' opposition papers, insofar as may be necessary, up to the date of the hearing of the application.

**The principal grounds of challenge to the deemed withdrawal of the applicant's appeal**

31. The applicant advances the following grounds in support of his challenge to the decision of the Tribunal to deem his subsidiary protection declaration refusal appeal to be withdrawn, pursuant to reg. 9 (2) of the 2013 Regulations:

> a) The Tribunal misapplied reg. 9 (2) to the facts of his case.
>
> b) The Tribunal failed to consider the applicant's reasons for not attending at the hearing of his appeal.
>
> c) The Tribunal erred by determining that the applicant had not provided a 'subsequent explanation' for his failure to attend the hearing of his appeal, when the applicant had provided an explanation in advance of the date fixed and, thus, within the time allowed.
>
> d) The Tribunal acted in breach of the applicant's entitlement to fair procedures by failing to provide proper or adequate reasons for its decision to deem his appeal to have been withdrawn and by failing to give reasons why the interests of justice required the Tribunal to deem the applicant's appeal withdrawn rather than to proceed with the hearing of the applicant's appeal in the absence of the applicant.
>
> e) That the decision to deem the applicant's appeal withdrawn was disproportionate in light of the possibility of conducting the hearing of the applicant's appeal in the absence of the applicant.
>
> f) The Tribunal failed to properly apply the provisions of reg. 9 (2) of the 2013 Regulations, properly interpreted, or to properly consider the 'applicant's application' when deeming his appeal withdrawn.

**The opposition to those grounds**

32. The respondents join issue with the applicant on each of the grounds he puts forward. It is necessary to look at the statement of opposition in a little more detail as the applicant is critical of the way in which the grounds of opposition are pleaded.

33. The applicant points to the requirement under O. 84, r. 5 of the RSC whereby a general denial in the statement of opposition of the applicant's grounds for seeking relief is not sufficient and the respondents must state precisely each ground of opposition, giving particulars where appropriate. The applicant relies on the following passage from *Saleem v Minister for Justice* [2011] IEHC 55 in which, having acknowledged that a public authority respondent has the same entitlement as any other to deny all essential elements of the grounds alleged and to put the applicant on proof of all material aspects of the claim, Cooke J continued (at §17):

> 'Nevertheless, because in judicial review the High Court is exercising its constitutional and public law function of ensuring that delegated executive decision making powers have been validly exercised in accordance with law, it behoves the respondent to assist the court not only by identifying the issues of fact, if any, which it contests but also by stating frankly and clearly in its pleading, so far as this can reasonably be done, the view or stance it proposes to adopt on the questions of law or issues of interpretation which it considers to be raised by the claim and to require determination by the Court.'

34. In circumstances that I will come on to address shortly, the applicant contends that there has been a failure by the respondents either to identify the issues of fact they contest or to state frankly or clearly in their pleading, as they could reasonably do, the view or stance they adopt on the question of law or issues of interpretation that require determination by the court. Separately, the applicant relies on the decision of the Court of Appeal in *Balchand v Minister for Justice and Equality* [2016] IECA 383 (per Finlay Geoghegan J at §18) to remind the court that it would fall into error if it were to determine the present application on grounds other than those relied upon by the respondents.

35. The respondents advance the following grounds of opposition:

(a) The Tribunal did not misapply reg. 9 (2) of the 2013 Regulations.

(b) The Tribunal did not fail to consider the reasons that the applicant gave for his non-attendance. Those reasons were considered at the appropriate stage of the procedure and were fully and properly considered before being rejected.

(c) The Tribunal did not err in determining that the applicant had failed to provide a subsequent explanation for his failure to attend the oral hearing of his appeal.

(d) The Tribunal did not breach the applicant's entitlement to fair procedures.

(e) The Tribunal's decision to deem the applicant's appeal withdrawn was not disproportionate.

(f) The Tribunal has not failed to properly apply the 2013 Regulations or to properly consider the applicant's appeal.

(g) Regulation 8 (9) of the 2013 Regulations obliges the Tribunal to hold an oral hearing where it is of the opinion that it is in the interest of justice to do so. The determination by the Tribunal that it was of the opinion that it was in the interest of justice to hold an oral hearing of the applicant's appeal was made on 13 November 2015 and the applicant did not challenge that determination.

(h) Once that determination had been made on the applicant's appeal, the Tribunal was obliged to hold an oral hearing.

(i) Because the applicant failed, without reasonable cause, to attend the oral hearing that had been fixed for the 17th February 2016, and did not furnish the Tribunal with any explanation for not attending the hearing within 3 working days of that date, the Tribunal was obliged under the express terms of reg. 9 (2) of the 2013 Regulations to deem his appeal withdrawn.

(j) The Tribunal did not fail to comply with the obligation to give reasons.

**Relevant provisions of the 2013 Regulations**

36. Regulation 8 of the 2013 Regulations deals with appeals to the Tribunal. Under reg. 8 (2)(b), an applicant is required to specify in the notice of appeal whether he or she 'wishes the Tribunal to – (i) hold an oral hearing for the purpose of his or her appeal, and (ii) if so, direct the attendance of a witness before the Tribunal.' Regulation 8 (8) provides that, subject to reg. 8 (9), an appeal may be determined without an oral hearing. Regulation 8 (9) provides that the Tribunal shall hold an oral hearing 'where – (a) subject to paragraph (11), the applicant has requested this in the notice under paragraph (2), or (b) is of the opinion that it is in the interest of justice to do so. Regulation 8 (10) requires the Tribunal to fix a time and a date for an oral hearing and to provide the appropriate notice to the parties.

37. Regulation 8 (11) is a key provision. It states:

'(a) An applicant may withdraw a request for an oral hearing made in a notice under paragraph (2) by giving written notice, which shall set out the reasons for the withdrawal, to the Tribunal not later than 3 working days before the hearing date.

(b) The Tribunal, on receipt of a notice under paragraph (a), shall consider, having regard to the interests of justice, whether to hold an oral hearing.'

38. Regulation 8 (12) provides that, where a notice of appeal includes a request to the Tribunal to direct the attendance of a witness at the oral hearing, the Tribunal shall determine whether that witness should be directed to attend, having regard to the nature and purpose of the evidence to be given. Regulation 8 (13) permits the Tribunal to direct a witness to appear. It also permits the Tribunal to give 'any other directions … that appear to the Tribunal reasonable and just.'

39. Regulation 8 (18) is also of central relevance to the applicant's arguments. It provides in relevant part:

'In conducting an oral hearing, the Tribunal shall-

(a) enable the applicant to be present at the hearing and present his or case to the Tribunal in person or through a legal representative,

…

(e) conduct the hearing as informally as is practicable, and consistent with fairness and transparency,

(f) decide the order of appearance of the applicant and the Commissioner and any witness,

(g) ensure that the oral hearing proceeds with due expedition,

(h) allow for the examination and cross-examination of the applicant and any witnesses, and

(i) ensure that a witness shall be present at the oral haring only for the duration of his or her evidence.'

**The arguments advanced**
i. the argument on the pleadings

40. The first argument advanced by the applicant is the one already flagged above; that the respondents have failed to state frankly or clearly in their pleading, as they could reasonably have done, the view or stance they adopt on the questions of law or issues of interpretation that require determination by the court.

41. The applicant's contention in that regard is as follows. The respondents' position is that the Tribunal determined on 13 November 2015 that, in its opinion, it was in the interests of justice to have an oral hearing of the applicant's appeal. On 15 December 2015, the applicant's solicitors informed the Tribunal that 'a basis for the non-attendance of the applicant at the oral hearing was his concern about the effect that the stress of it would have on his health in light of his post-traumatic stress disorder.' The logical consequence of the respondents' plea is that the Tribunal could not have considered or weighed that reason when it determined to hold an oral appeal. The respondent's plea that the reasons that the applicant gave for his non-attendance were considered 'at the appropriate stage of the procedure', does not identify at what stage of the procedure that was, and there is only a single possible stage when it could have been; that is after the non-attendance occurred on 17 February 2016.

42. The applicant continues that it follows from the foregoing analysis that there is no answer to the applicant's claim: that there was a failure to consider the reasons he proffered for his non-attendance; that he was not obliged to provide a subsequent explanation for his non-attendance; or that the respondent failed to provide adequate reasons for its decision to deem his appeal to be withdrawn. Further, the applicant submits that the respondents' position must rely on the proposition that 'ill-health in the form of post-traumatic stress disorder and the fear of exacerbating it, cannot be a criterion for a Tribunal to consider either in deciding whether the balance of justice requires an oral hearing or in considering what constitutes a reason for non-attendance at an oral hearing.'

43. I find that argument difficult to follow. In any event, I do not accept it.

44. In the first place, it omits or obscures several material facts. It is common case that, in giving notice of his appeal in writing (though not legally represented at the time), the applicant indicated that he wished the Tribunal to hold an oral hearing. The letter that the applicant's solicitors wrote to the Tribunal on 17 August 2015 can only be construed as a notice in writing that the applicant wished to withdraw his request for an oral hearing, although it did not comply with the requirement under reg. 8 (11) of the 2013 Regulations that it be given not later than three working days before the hearing date, which was 19 August. Nonetheless, the Tribunal did not proceed with the oral hearing on that date.

45. The applicant gave his reasons for withdrawing his request for an oral hearing in his written submission of the 18th August. There was nothing in that submission to suggest that the applicant was unable to attend an oral hearing on medical, or any other, grounds. Rather, it was the applicant's position that he was entitled to rely on the Commissioner's acceptance of the credibility of his account at first instance as somehow determinative of the issue of his credibility for the purpose of his appeal, rendering his attendance at the appeal superfluous (assuming, as the applicant evidently did, that the only reason why his attendance might be required was to enable his credibility to be assessed). That position is difficult to reconcile with the observation of the Supreme Court (per Charleton J) in *M.A.R.A. v Minister for Justice* [2014] 1 IR 561 at 577 that an appeal under the analogous refugee status application procedure is an active rehearing. Nor is it easy, if possible at all, to reconcile it with the separate obligation on the Tribunal under reg. 11 of the 2013 Regulations to assess the credibility of the applicant in determining his appeal.

46. It was in that context that the Tribunal was required, under reg. 8 (11) (b) of the 2013 Regulations, to consider whether to hold an oral hearing, 'having regard to the interests of justice'. That the Tribunal did so, is evident from the terms of its letter of 13 November 2015, in which the basis of its opinion that it was in the interests of justice to conduct an oral hearing was clearly identified. The Tribunal had issues that it wished to raise with the applicant in person concerning both the credibility of his account and the possibility of his internal relocation within Kosovo.

47. The applicant's solicitors wrote to the Tribunal on the 15 December 2015 to inform it of the applicant's preference or wish not to attend the hearing because of his belief or concern that the associated stress and anxiety may have an adverse effect on his health given his diagnosis of post traumatic stress disorder. A short letter from a general practitioner noting that diagnosis was enclosed, although it did not address the question of the applicant's fitness to attend before the Tribunal.

48. In relation to the significance of that letter and enclosure of the 15 December 2015, the applicant's position appears to me to involve the admixture of two quite separate arguments. The first is that the Tribunal failed to properly consider or reconsider its opinion that it was in the interests of justice to hold an oral hearing of the applicant's appeal, once it received that letter and enclosure. The second is that the Tribunal erred in law and in fact in failing to construe that letter and its enclosure either as reasonable cause for the applicant's failure to attend the proposed, or any, oral hearing of his appeal, or as a reasonable explanation for such failure, offered in advance. The letter does not clarify its purpose in that regard. It certainly did not suggest in terms that it was an assertion of reasonable cause, or a reasonable explanation, for the non-attendance of the applicant at his appeal. This is relevant when we come on to consider the applicant's criticism that the Tribunal's reply of the 12 February 2016 fails to address the issue of 'reasonable cause' or 'reasonable explanation' per se.

49. On the first argument, the first point to make is that it presupposes that the communication to the Tribunal by the applicant's solicitors of the applicant's subjective concerns about the possible effect of his participation in the appeal on his previous diagnosis of post-traumatic stress disorder, required the Tribunal to reconsider the opinion it had formed on stated grounds that it was in the interests of justice to hold an oral hearing. Second, it ignores the fact that the Tribunal's letter of the 12 February 2016 does indicate that the Tribunal did consider the new reason proffered for the applicant's preference to have a 'papers only' appeal, but was satisfied that it was not sufficient to disturb the opinion the Tribunal had already formed that an oral hearing was in the interests of justice.

50. The applicant's contention that the only possible stage at which his reasons for non-attendance could have been considered was on or after the date of the scheduled hearing entirely ignores the Tribunal's letter of 12 February, in which the concerns expressed on behalf of the applicant in the letter of 15 December were noted; an assurance was given that the applicant's sensitivity as a person who had suffered trauma would be taken into account in the conduct of the hearing; and the applicant was informed, through his solicitors, that the oral hearing would, therefore, proceed as scheduled.

51. For my part, I fail to see how it can be suggested that the respondents' position must rely on the proposition that 'ill-health in the

form of post-traumatic stress disorder and the fear of exacerbating it, cannot be a criterion for a Tribunal to consider either in deciding whether the balance of justice requires an oral hearing or in considering what constitutes a reason for non-attendance at an oral hearing.' There is nothing in the evidence before me to suggest the application by the Tribunal of any such inflexible rule or that its decision was not based on a proper consideration of the material placed before it on behalf of the applicant.

52. In summary, I can identify nothing in the statement of opposition here in any way comparable to the specific infirmities of pleading identified by Cooke J in the statement of opposition that was at issue in Saleem. Accordingly, that argument must fail.

ii. reasonable explanation for non-attendance at the oral hearing

53. It is convenient to consider the first and third grounds together. They are that the Tribunal misapplied reg. 9 (2) and that it erred in determining that the applicant had not provided a 'subsequent explanation' for his failure to attend the hearing of the appeal, when the applicant had provided an explanation in advance of the hearing and, thus, within the time allowed.

54. The applicant's argument on these grounds focuses on the statement in the Tribunal's letter of the 25th February that the applicant had failed, without reasonable cause, to attend the hearing on 17 February 2016 and that 'no subsequent explanation' had been received. The applicant contends that the statement concerned amounts to a misapplication of the correct test under reg. 9 (2) because the imposition of a condition that a reasonable explanation for non-attendance must be furnished 'not later than 3 working days from the date fixed… for the oral hearing' in that paragraph must be construed as permitting the said explanation to be furnished either at any time prior to the oral hearing or not later than 3 working days from the date of the hearing.

55. I do not accept that the construction of reg. 9 (2) for which the applicant contends is correct for several reasons. First, it ignores the plain and ordinary meaning of the words used. Those words are '3 working days from the date fixed…for the oral hearing.' The use of the preposition 'from' before the phrase 'the date fixed …for the oral hearing' establishes that the date fixed for the oral hearing is the starting point for the calculation of the '3 working day' period during which a reasonable explanation must be provided.

56. Second, the plain and ordinary meaning of the words used leads to a construction that accords with common sense. The applicant's argument requires the term 'reasonable explanation' to be considered artificially in isolation from the term 'reasonable cause', employed earlier in the same paragraph. Under reg. 9 (2), it is only a failure by an applicant to attend an oral hearing 'without reasonable cause', that requires the provision of a reasonable explanation for non-attendance within three working days afterwards. There is no necessity to strain the meaning of the words used in reg. 9 (2) to allow the provision of a reasonable explanation for non-attendance to be provided not later than 3 working days from the date fixed for an oral hearing or at any time in advance of that hearing, since a reasonable explanation provided in advance of the hearing must inevitably amount to a 'reasonable cause' for non-attendance. It seems to me that a strained construction of the 'reasonable explanation' clause to cover explanations proffered in advance could only be required if the deemed withdrawal of an appeal was otherwise the consequence of non-attendance at an oral hearing simpliciter, rather than of non-attendance at an oral hearing without reasonable cause.

57. A fundamental difficulty that arises in considering each of the arguments that the applicant puts forward, including this one, is that, in his statement of grounds, his grounding affidavit and in his written legal submissions, he fails to identify the 'reasonable explanation' or 'reasonable cause' for his non-attendance at the oral hearing that he criticises the respondents, in various ways, for failing to properly address. None of the letters written by the applicant's solicitors to the Tribunal refer to reg. 9 (2) or suggest, in terms, that there is a 'reasonable cause' or 'reasonable explanation' for the proposed non-attendance of the applicant at the scheduled oral hearing.

58. What, then, was the cause of, or reason for, the applicant's non-attendance at the hearing that was scheduled to take place on 17 February 2016? Was it that the Commissioner's subsidiary protection report had accepted the applicant's credibility, which is the reason given on 18 August 2015 for the withdrawal of the applicant's request for an oral hearing? Was it the applicant's diagnosis of PTSD and his wish to avoid increasing his anxiety by having to recount the ill-treatment that he was subjected to prior to his departure from Kosovo, which is the reason given on 15 December 2015 for the applicant's wish not to attend the oral hearing then scheduled for 17 December 2015? Was it the applicant's belief that attendance at the hearing would be stressful and may have an adverse effect on his PTSD, which is the reason given on 11 February 2016 why the applicant would 'prefer' not to attend the hearing scheduled for 17 February 2016? Or is it a combination of those reasons?

59. The question arises at this point because the applicant's argument that the Tribunal misapplied reg. 9 (2), implies that he had provided a reasonable explanation for his non-attendance at the oral hearing, which the Tribunal had failed to accept as such or as amounting to reasonable cause for that non-attendance, since otherwise the point would be moot. This, in turn, implies either that there was a complete refusal by the Tribunal to consider the applicant's explanation or that the applicant was prejudiced by the consideration of that explanation only in the context of whether it amounted to 'reasonable cause' for non-attendance.

60. For my part, I can see no meaningful distinction between the terms 'reasonable cause' and 'reasonable explanation', save that the latter might be considered to cast an onus on the applicant that the former does not. For example, if there was a significant weather event or public transportation disruption or other occurrence of which judicial notice might be taken, constituting an obvious obstacle to the applicant's attendance at an oral hearing, the Tribunal might well conclude the existence of reasonable cause for the applicant's non-attendance without the necessity for any explanation to that effect from the applicant or anyone else on his behalf. Similarly, if an applicant or someone close to an applicant had an accident or contracted a serious illness, or if there was a problem with the applicant's personal transportation arrangements, that might well constitute reasonable cause for the applicant's non-attendance if it came to the attention of the Tribunal before or at the oral hearing, or might equally constitute a reasonable explanation for that non-attendance if brought to the Tribunal's attention 'not later than 3 working days from the date fixed' for that hearing. Once the practical application of the plain and ordinary meaning of the words used in reg. 9 (2) is thus considered, the artificiality of the issue presented by the applicant is immediately apparent.

61. The applicant has drawn the court's attention to one of the provisions of s. 35 of the International Protection Act 2015 ('the 2015 Act'), which, though not directly applicable to the facts of this case and not in force at the material time, he contends provides a significant and relevant contrast with reg. 9 (2) of the 2013 Regulations. Section 35 of the 2015 Act deals with the personal interview of an applicant for international protection that forms part of the first instance examination of such a claim: Section 35 (8) of the 2015 Act represents a departure from the terms of the equivalent provision of the 2013 Regulations, reg. 5 (3). The latter simply states that, as part of the first instance investigation of a subsidiary protection claim, the Commissioner shall interview the applicant. In contrast, s. 35 (8) provides, in material part:

> 'A personal interview may be dispensed with where the international protection officer is of the opinion that –

…

(b) The applicant is unfit or unable to be interviewed owing to circumstances that are enduring and beyond his or her control.'

62. I am not certain on what basis the applicant contends that a consideration of s. 35 (8) of the 2015 Act assists his argument in relation to reg. 9 (2) of the 2013 Regulations. In the first place, it is not suggested that there is any material difference between the terms of reg. 9 (2) and those of the directly equivalent provision under the 2015 Act, s. 45 (2), which calls into question the relevance of the analogy that the applicant seeks to draw. Second, it appears to be common case that the applicant in this case did attend a personal interview in 2014 in connection with his claim for subsidiary protection at which he did recount the ill-treatment that he was subjected to prior to his departure from Kosovo. Third, if s. 35 (8) of the 2015 Act had been in force at the material time and applicable to a hearing before the Tribunal, it is difficult to see how it could have made any difference to the applicant's position, since he had not established that he was unfit or unable (as opposed to unwilling or reluctant) to attend the oral hearing of his appeal, or that the medical or psychiatric condition to which his reluctance to attend was attributed is an enduring one. Fourth, if the applicant had established on the evidence that he was unfit or unable to attend the oral hearing of his appeal on those grounds, it is difficult to see how that could have been characterised as anything other than reasonable cause for his non-attendance at the oral hearing of his appeal, raising the question; what could the insertion into reg. 9 (2) of the words used in s. 35 (8), or similar words, add to assist the position of the applicant before the Tribunal in this case?

63. I therefore reject the first and third grounds relied upon by the applicant.

iii. reasons

64. It is also convenient to deal with the applicant's second and fourth grounds together. They are that the Tribunal failed to consider the applicant's reasons for not attending at the hearing of the appeal and that it acted in breach of the applicant's entitlement to fair procedures by failing to provide proper or adequate reasons for its decision to deem his appeal to have been withdrawn and by failing to give reasons why the interests of justice required the Tribunal to deem the applicant's appeal withdrawn rather than to proceed with the hearing of the applicant's appeal in the absence of the applicant.

65. These grounds highlight the second reason why it is significant that the applicant has failed to identify the specific reasons that he contends constituted a reasonable explanation for his non-attendance at the oral hearing. That failure demonstrates the weakness or artificiality of the applicant's argument that the Tribunal failed to provide him with its reasons for rejecting that explanation. In so far as the applicant's reasons for his non-attendance at the oral hearing comprised any one, or combination of, those that I have already attempted to identify, I am satisfied that the Tribunal's letters of 13 November 2015 and 12 February 2016 did provide him with its reasons for rejecting them as a basis for concluding either that an oral hearing was not in the interests of justice or that reasonable cause had been shown, or a reasonable explanation given, for the applicant's proposed non-attendance at that hearing.

66. The applicant's first argument in support of these grounds is that the Tribunal failed to give reasons for its determination that the applicant had failed to show reasonable cause for his non-attendance at the oral hearing. Passing over the identification of what, if any, reasonable cause he had shown for his non-attendance at the oral hearing, the applicant submits that 'not only are no reasons given in the decision [that reasonable cause had not been shown], it is not even recorded that a reason for non-attendance was proffered by the [a]pplicant or that it was rejected.'

67. At pain of repetition, I have been unable to find anything in the correspondence that purports, in terms, to identify a reasonable cause for the applicant's proposed non-attendance at the oral hearing. If the reason relied on for non-attendance at the oral hearing was one or more of the matters raised in the letters from the applicant's solicitors of 18 August 2015, 15 December 2015 or 11 February 2016, then I am satisfied that the Tribunal's reasons for rejecting each of the matters raised as potentially constituting reasonable cause for such non-attendance are clearly set out in its letters of response dated the 13th November 2015 and the 12th February 2016. The applicant's argument is then limited to the assertion that the decision recorded in the Tribunal's letter of the 25th February 2016 is technically flawed because of a failure on the part of the Tribunal to recognise one or more of those matters as potentially constituting reasonable cause for non-attendance and to formally restate its reasons for the rejection of that submission. In that regard, the applicant relies on the following passage from the decision of the Supreme Court in *EMI Records (Ireland) Ltd v Data Protection Commissioner* [2013] 2 IR 669 at 739:

> '[70] While the comments made in *Christian v. Dublin City Council* [2012] IEHC 163 , [2012] 2 I.R. 506 related to the specific circumstances of that case and derived from the context of a development plan, it seems to me that there is a more general principle at play. Legal certainty requires, as was pointed out in *Christian v. Dublin City Council* [2012] IEHC 163 , that it must be possible to accurately determine what the reasons were. There should not be doubt as to where the reasons can be found. Clearly, an express reference in the decision itself to some other source outside of the decision document meets that test. Where, however, it is suggested that the reasons can be found in materials outside both of the decision itself together with materials expressly referred to in the decision, then care needs to be taken to ensure that any person affected by the decision in question can readily determine what the reasons are notwithstanding the fact that those reasons do not appear in the decision itself or in materials expressly referred to in the decision.
>
> [71] Where, for example, an adjudicator makes a decision after a process in which both sides have made detailed submissions it may well, as Fennelly J. pointed out in *Mallak v. Minister for Justice* [2012] IESC 59 , [2012] 3 I.R. 297 , be that the reasons will be obvious by reference to the process which has led to the decision such that neither of the parties could be in any reasonable doubt as to what the reasons were. But it seems to me that, in a case where any party affected by a decision could be in any reasonable doubt as to what the reasons actually were, it must follow that adequate reasons have not been given.'

68. I do not think that this authority can avail the applicant. The paragraph in the judgment of Clarke J that immediately precedes the passage quoted notes the acknowledgment by Fennelly J in *Mallak v Minister for Justice* [2012] 3 IR 297 at 322, that, while the most obvious means of achieving fairness is for reasons to accompany the decision, it is not a matter of complying with a formal rule. Since the underlying objective is the attainment of fairness in the process, if that process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded. And the paragraph from the judgment of Clarke J that immediately follows the passage relied upon, points out that there may, of course, be cases where it is easy to see what reasons have been given and where the real issue is as to whether those reasons are adequate.

69. Here, to the extent that it can be said that the applicant's solicitors put forward reasonable cause for his non-attendance at the

oral hearing by implication in asserting his preference for a 'papers only' appeal, the Tribunal's reasons for rejecting that submission are plainly set out in its correspondence in reply. To the extent that the applicant failed, in that correspondence, to identify, in terms, a reasonable cause for non-attendance at the hearing, he cannot be heard to complain that the reason given for the Tribunal's determination that his appeal must be deemed withdrawn under reg. 9 of the 2013 Regulations went no further than that he had failed to attend the oral hearing without reasonable cause or reasonable explanation.

70. I do not accept the proposition that, as an aspect of the applicant's entitlement to fair procedures, the Tribunal was obliged to furnish him with reasons why it was not in the interests of justice to proceed with the hearing of his appeal in his absence rather than to deem his appeal withdrawn. Under reg. 9 of the 2013 Regulations, the Tribunal was required to form an opinion on whether it was in the interests of justice to hold an oral hearing. The Tribunal's letter of 13 November 2015 notified the applicant of the Tribunal's opinion that it was in the interests of justice to hold an oral hearing, and of the reasons for that decision. The Tribunal's letter of 12 February 2016 notified the applicant that the Tribunal did not accept that the applicant's expressed concern regarding the potential effect on his health of his attendance at the hearing, in view of his diagnosis of PTSD, was sufficient to alter that opinion and set out its reasons for reaching that conclusion. On behalf of the applicant, it was never suggested in correspondence that, for the purposes of reg. 9 of the 2013 Regulations, his concern in that regard amounted to reasonable cause or a reasonable explanation for his non-attendance at the oral hearing. In so far as the letter of 11 February 2016 from the applicant's solicitors is capable of being construed in that way, then the Tribunal's reply of 12 February must be construed as the rejection of that submission for the reasons stated. That being so, the ensuing failure of the applicant to attend at the hearing without reasonable cause, and without furnishing a reasonable explanation within the time permitted, meant that his appeal had to be deemed withdrawn by operation of that regulation.

71. For that reason, I also reject the applicant's contention that the Tribunal wrongly conflated the issues of whether an oral hearing was in the interests of justice and whether there was reasonable cause for the applicant's non-attendance at that hearing. It is only to the extent that the applicant now argues that his solicitor's letter of 11 February 2016 should be construed as addressing both issues, that the Tribunal's letter of response, dated 12 February 2016, falls to be considered in the same way. It was for the applicant to show reasonable cause, or provide a reasonable explanation, for his failure to attend the oral hearing if his appeal was not to be deemed withdrawn under reg. 9 of the 2013 Regulations.

72. The applicant submits that there was a 'clear unfairness' in that the Tribunal 'did not clearly state' in its letter of 12 February 2016 that the reason for the applicant's proposed non-attendance given in his solicitors' letter of 11 February 2016 was not accepted by the Tribunal as reasonable cause for such non-attendance, and did not alert the applicant to the possibility that his non-attendance would result in the deemed withdrawal of his appeal. That submission cannot succeed because it ignores the following points. First, the applicant's preference not to attend the appeal in person was put forward in support of a further request for a 'papers only' appeal and not as 'reasonable cause' for the applicant's non-attendance at the oral hearing. Second, insofar as that letter was capable of being construed as advancing 'reasonable cause' for such non-attendance, the Tribunal's letter in reply, culminating in the statement that the oral hearing would proceed as scheduled, can only be construed as a clear and unequivocal rejection of that submission. Third, the deemed withdrawal of an appeal in the event of an applicant's non-attendance at an oral hearing without reasonable cause or the provision of a reasonable explanation within the prescribed period, occurs by operation of law under reg. 9 (2) and is therefore something that the applicant and his legal advisors had to be aware of. And fourth, the applicant's solicitors had been warned in three separate standard form letters – of 22 July 2015, 29 July 2015 and 2 February 2016 – that a failure by the applicant to attend a scheduled oral hearing in those circumstances would result in the deemed withdrawal of his appeal.

73. I can find no basis in law for the submission that, where the applicant had without reasonable cause failed to attend the hearing, the Tribunal was obliged to consider whether to proceed with the hearing in his absence. It may very well be, as the applicant contends, that the 'statutory architecture' of the 2013 Regulations contemplates the possibility of the conduct of an oral hearing without the applicant being present in certain unusual circumstances but, as the applicant had to have been aware, this could not have been such a case. A consideration of reg. 18 (f) and (h) of the 2013 Regulations confirms that the examination of an applicant at the oral hearing of an appeal is plainly envisaged as the norm, even if it may be argued that it is not an absolute rule. In this case, the applicant had been clearly informed that the Tribunal wished to examine him in person concerning issues of credibility and internal relocation. No other basis for holding an oral hearing had been suggested either by the Tribunal, the Commissioner or the applicant. In the circumstances, the suggestion that the Tribunal should have considered proceeding with an oral hearing in the absence of the applicant is, with respect, absurd.

74. The applicant submits that, if the Tribunal considered he was malingering, it should have exercised its power under reg. 9 (3) of the 2013 Regulations to send the applicant a 'non-cooperation' notice; or its power under reg. 8 (13) to direct the attendance of the applicant's doctor as a witness before the Tribunal; or the same power to direct the applicant to attend as a witness before it. I see no evidence that the Tribunal had formed the view that the applicant was malingering. His diagnosis of PTSD appears to have been accepted without question. The issue at all material times was whether that condition precluded him from attending at the oral hearing. The applicant adduced no medical evidence whatsoever in that regard. The onus was on the applicant to show reasonable cause for non-attendance at the oral hearing. There was no onus on the Tribunal to conduct a separate or parallel inquiry into the applicant's fitness to attend the hearing, at least in the absence of some medical evidence purporting to establish his unfitness to attend. Legal proceedings of any kind are potentially stressful. A mere expression of concern that the stress of giving evidence may precipitate an illness, or exacerbate an existing one, cannot be sufficient, in either an inquisitorial or an adversarial setting, to place an onus on the Tribunal to conduct an inquiry into that issue, without something more.

75. I therefore reject the second and fourth grounds relied upon by the applicant.

iv. proportionality

76. The applicant's fifth ground is that the decision to deem his appeal withdrawn was disproportionate in light of the possibility of conducting the oral hearing in his absence. That argument must fail for two reasons. First, the applicant's appeal was deemed withdrawn by operation of law under reg. 9 (2) of the 2013 Regulations. It was the direct consequence of the applicant's failure to attend the oral hearing without reasonable cause and without providing a reasonable explanation. It did not represent the exercise of any discretion on the part of the Tribunal to deem his appeal withdrawn rather than hold an oral hearing in his absence.

77. Second, even if reg. 9 (2) or some other regulation did confer upon the Tribunal a discretion to consider conducting an oral hearing in the absence of the applicant after he had failed to appear, so that the deemed withdrawal of the applicant's appeal in this case could be viewed as the exercise by the Tribunal of such a discretion, I could find nothing disproportionate in it. As has already been stated, the basis of the Tribunal's earlier decision that it was in the interests of justice to conduct an oral hearing was to enable it to examine the applicant in person concerning issues with his credibility and the possibility of his internal relocation within Kosovo. No other basis for holding an oral hearing was ever suggested either by the Tribunal, the Commissioner or the applicant. The

legitimate objective of conducting a transparent and fair subsidiary protection application process would not affect or prejudice an applicant's rights disproportionately where the failure by the applicant without reasonable cause or explantion to attend an oral hearing that has been determined to be in the interests of justice results in a determination that his or her application is deemed withdrawn. But I stress again that, here, no such determination was made in the exercise of any discretion; rather, the deemed withdrawal of the applicant's appeal occurred by operation of law.

78. Similarly, if the suggestion is being made (and I am not sure it is), that the Tribunal might have considered adjudicating on the merits of the applicant's appeal despite his failure, without reasonable cause or explanation, to attend the oral hearing that the Tribunal had directed as being in the interests of justice, that would require the Tribunal and the court to disregard the express words of reg. 9 (2). It would, in effect, mean rewriting the provisions of the 2013 Regulations to confer upon an applicant, by implication, a right in principle not to attend, and not to be examined at, an oral hearing. That is something that neither the Tribunal nor the court is empowered to do. It is also something that is difficult, if not impossible, to reconcile with the familiar principle that an applicant for protection is not, and is not intended to be, a passive participant in the application process; The Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 IR 360 at 395.

79. I therefore reject this ground.

i. the sixth ground

80. The applicant's sixth ground is that the Tribunal failed to properly apply the provisions of reg. 9 (2) of the 2013 Regulations and failed to properly consider the applicant's appeal. It is a recapitulation of the grounds already advanced and which I have already rejected.

**Conclusion**
81. For the reasons given, I refuse the application.