THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 852 JR.]

[2011 No. 856 JR.]

[2012 No. 562 JR.]

BETWEEN

M.L. (DRC)

J.C.B. (DRC)

AND

V.J. (MOLDOVA)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY AND THE ATTORNEY GENERAL IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 20th day of June, 2017

The Cases of M.L. and J.C.B.

1. The first named applicant, M.L., is a national of the Democratic Republic of the Congo (DRC) who arrived in Ireland in or about September 2008. He applied for asylum and was refused by the first respondent. He sought subsidiary protection status and leave to remain in the State on "humanitarian grounds" under s.3 of the Immigration Act, 1999, as amended, which was refused on 11th August, 2011.

2. M.L. applied for subsidiary protection on 17th January 2011. He made further representations and supplied additional country of origin information through his solicitors on the Democratic Republic of the Congo on 1st May 2011. On 31st May 2011, Ms. Elaine Doyle, Executive Officer completed a consideration of his file and recommended that he was not eligible for subsidiary protection. On 20th July Ms. Maire Ní Fheinneadha, Higher Executive Officer accepted the recommendation and determined that he was not eligible. M.L. was notified of this decision by letter dated 25th July 2011. Thereafter on 10th August 2011 his application for leave to remain was considered by the same Ms. Doyle, who following an examination of his file under s. 3 of the 1999 Act, recommended his deportation. This file was also reviewed by Ms. Ní Fheinneadha and then by Mr. Michael Flynn, Assistant Principal on the 10th August. The recommendation was affirmed and the deportation order was made by Mr. Noel Waters on behalf of the Minister on 11th August 2011. M.L. was notified of this by letter dated 19th August. There was a period of approximately two months between the initial consideration of the subsidiary protection application by Ms. Doyle and her examination of file under s.3. There was approximately one week between the refusal of subsidiary protection and the making of the deportation order and between the dates of notification of each to M.L.

3. An application for leave to apply for judicial review was made by the applicant on 13th September, 2011. Relief was sought on fourteen grounds set out in the original statement of grounds.

4. J.C.B., the second named applicant, also a DRC national, claims to have arrived in the State on 6th February, 2009 aged twenty and claimed asylum which was refused on 5th October 2010. He then applied for leave to remain in the State on "humanitarian grounds" under s. 3 of the 1999 Act and also made an application for subsidiary protection on 13th October, 2010. On the 28th June, 2011 the application for subsidiary protection was refused of which he was notified by letter in July. On the 18th August, 2011 he received a letter from the first respondent enclosing a deportation order and an examination of file under s. 3 dated 27th June. It was determined on 5th July that there were no humanitarian grounds for leave to remain and that a deportation order should be made. This was signed on the 5th August. The applicant was informed of his obligation to leave the State by the 3rd September, 2011 and required to present himself to the Garda National Immigration Bureau (GNIB) to make arrangements for his removal from the State.

5. J.C.B. applied for subsidiary protection following notification of the refusal of his application for refugee status and receipt of the three options letter. He applied for leave to remain in the State on the same day. The factual basis of his claim for subsidiary protection was the same as that which grounded his application for asylum. In addition, submissions were made in respect of country of origin information. On 27th June 2011 a consideration was carried out by Ms. Mary T. Groves, Executive Officer who recommended that he be deemed ineligible for subsidiary protection. This was also considered by Ms. Maire Ní Fheinneadha, Higher Executive Officer who affirmed the recommendation. Mr. Michael Flynn, Assistant Principal on 28th June 2011 reviewed the case and the recommendation and determined that J.C.B. was ineligible for subsidiary protection and he was so notified on 25th July 2011. On the 27th June 2011 the same Ms. Groves examined his leave to remain application under s. 3 and an examination of file was prepared in which she recommended his deportation. It was also reviewed by Ms. Ní Fheinneadha. Mr. Flynn considered the papers on 5th July and agreed with the recommendation. A deportation order was signed by Mr. Noel Waters on the 5th August 2011 of which he was notified by letter dated 17th August. It is clear that the consideration of his leave to remain application followed immediately upon Ms. Groves' recommendation that he was ineligible for subsidiary protection. There was approximately one month between the notification of each decision to J.C.B.

6. Both applicants initially challenged the deportation orders and subsidiary protection decisions. In a reserved judgment delivered on 12th October, 2012 Clark J. granted leave to apply for judicial review in respect of the challenges to the decisions made concerning subsidiary protection. The learned judge considered the very large number of grounds advanced by both applicants which are summarised at para. 11 of the judgment under five headings as follows:

> "(i) Judicial review does not provide an effective remedy for a violation of a fundamental right guaranteed by EU law in

breach of Article 47 of the EU Charter of Fundamental Rights and Freedoms;

(ii) The procedures followed in relation to subsidiary protection were in breach of Directive 2004/83/EC in that the Minister did not cooperate with the applicants in the consideration of their applications;

(iii) The Minister engaged in selective treatment of country of origin information;

(iv) The decisions to make deportation orders against them were disproportionate because of the lifelong consequences of such an order; and

(v) The procedures adopted in relation to subsidiary protection were unfair."

The court rejected the grounds based on para. (i) above on the basis of well established case-law.

7. A claim was advanced that the protection regulations failed to properly transpose and implement Article 4(1) of the Qualification Directive rendering the subsidiary protection decision *ultra vires* and in breach of European Union law. The learned judge noted that Hogan J. had referred this point of law to the Court of Justice of the European Union in *Case C-277/11 M.M. v. Minister for Justice and Equality* (22nd November 2012) in respect of which, at that time, a decision was awaited. It was noted that on 26th April, 2012 Advocate General Bot had advised that there was no difficulty with the particular procedures referred. The court therefore adjourned its decision on that aspect of the challenge pending advice from the Court of Justice. This matter was revisited by this Court during the substantive hearing in the course of which leave to amend the statement of grounds to incorporate additional grounds based on the decision of the CJEU in *M.M.* was permitted. However, the ultimate determination of this aspect of the case was further delayed because it depended on the conclusion of litigation involving the interpretation of the judgment of the Court of Justice and the conclusion of the further reference to that Court by the Supreme Court. The first stage of these proceedings was therefore limited to the grounds set out below upon which leave was initially granted. I will return to the decisions in *M.M.* at a later stage.

8. The court rejected the grounds advanced based on para. (iii) holding that "no fact or circumstance was advanced by the applicants to establish even arguable grounds for contending that the Minister's assessment was irrational or unreasonable or that he ignored evidence that they faced a real risk of serious harm on their return to Kinshasa.

9. The court also refused leave on the grounds summarised in para. (iv) concerning the alleged disproportionality of a deportation order. The learned judge held that the applicants made a number of unconvincing arguments relating to the alleged disproportionate nature of the lifetime effect of a deportation order. The court noted that the effects of a deportation order were not necessarily lifelong as any person subject to such an order may seek revocation of the order even if he/she has already been returned to his/her home state and if successful, may apply for a visa to re-enter the State. This matter had already been addressed in a number of cases prior to this application. Nevertheless, the applicants continued to advance the same argument in the course of the case in support of the proposition that an effective remedy had been denied to them under European Union law.

10. The court examined the various grounds advanced alleging unfairness under para. (v) and summarised the grounds and the background against which they were advanced as follows:

> "40. The next argument under the heading of "Unfairness" relates to the timing of an application for subsidiary protection. Regulation 4(2) of the Protections Regulations of 2006 provides that the Minister is not obliged to consider an application for subsidiary protection from anyone other than a person to whom s. 3(2)(f) of the Immigration Act 1999 applies, i.e. a person whose application for asylum has been refused by the Minister. In many if not most cases, the refusal of refugee status will carry with it negative credibility findings. The reports of the Commissioner and the Tribunal must be put before the Minister when he is considering subsidiary protection. The unattractive status of being a failed asylum seeker is compounded by the tone and wording of the "three options" letter which indicates the person's entitlement to be in the State temporarily has now expired and that the Minister proposes to make a **deportation order**. The applicant is told to choose one of the three options; 1. leave the State; 2. consent to a deportation order; or 3. apply for subsidiary protection and/or make representations under s. 3 of the Immigration Act 1999. Later the applicant is informed that if he does not apply for subsidiary protection at the same time as he makes representations under s. 3, such an application will not be considered at a later date. In other words, an applicant has to accept that the Minister is entitled to deport while seeking to make the case that a protection decision is still outstanding, which is inherently unfair. Alternatively, if an applicant does not apply for subsidiary protection at the same time as representations under s. 3, then subsidiary protection will not be considered at a later date.
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> 41. The court is satisfied that this argument is sufficiently reasonable, arguable and weighty that leave should be granted to pursue the argument at a substantive hearing. Leave is granted against the following background. Ireland is the only EU Member State which does not have a single protection application system or what Cooke J. has described as a "*one stop*" procedure wherein applicants have their asylum and subsidiary protection applications assessed by the same decision maker at the same time (see *S.L. (Nigeria) v. The Minister and Others* [2011] IEHC 370). In contrast, Ireland operates a sequential, slow and protracted system where the ORAC and RAT have no jurisdiction to consider subsidiary protection. Only the Minister can consider such applications and although the right to apply for subsidiary protection is a right guaranteed by the Qualification Directive, in the terms of the "three options" letter sent by the Minister it is arguably regulated to a grace and favour status. In that letter the Minister states:
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> > "while your application was being decided you were allowed to stay in the State temporarily. The entitlement has now **expired**. The Minister now proposes to make a **deportation order** for you, under s. 3 of the Immigration Act, 1999, as amended."
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> 42. That may well be an incorrect statement of the law. The court is prepared to grant leave to pursue this ground. Indeed, since this judgment was written but before it was delivered the court has learned that Cooke J. has delivered a judgment in *V. J. (Moldova) v. the Minister* [2012] IEHC 337 (31st July, 2012) granting leave in relation to this very issue.
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> 43. The court has serious misgivings relating to the Minister's standard form letter and the directions relating to the third option, whereby an applicant is offered the right to apply for subsidiary protection which is rolled up with humanitarian leave to remain. One is a guaranteed EU right while the other is a discretionary power in the gift of the Minister subject to various international obligations. The Court is also concerned that eligibility for subsidiary protection is considered by a civil servant working in the Minister's Department who is not independent of the Minister in the performance of his duties,

as is required of the Refugee Application Commissioner and the Refugee Appeals Tribunal pursuant to ss. 6(b) and 15(b) of the Refugee Act 1996, as amended. Moreover, the experience, knowledge, training and education of those considering subsidiary protection on behalf of the Minister are unregulated. No requirement of competency applies to such persons comparable to that applicable to an authorised officer conducting an interview on behalf of the Refugee Application Commissioner under Regulation 3 of the Refugee Act (Asylum Procedures) Regulations 2011 (S.I. 52 of 2011). An equivalent competency requirement applies to those assessing subsidiary protection applications in all other Member States pursuant to Regulations 4(3) and 8(2)(c) of the Procedures Directive. As fundamental human rights are at issue and in circumstances where the legal framework underpinning eligibility for subsidiary protection is relatively complex, it is certainly arguable that an applicant for subsidiary protection in Ireland is disadvantaged when compared to applicants in other Member States. Ireland has not adopted a "one stop" procedure which means that the safe-guards applicable under the Procedures Directive do not apply to subsidiary protection applications here. It cannot be conducive to the adoption of common procedures throughout the whole EU if one country operates a system so much at variance with the other Member States, more particularly since Ireland opted into the common minimum standards introduced under the Qualification and Procedures Directive. However, draft legislation which envisages a unitary system has been before the Dáil in one form or another since 1988 and has yet to be brought into law.

44. While these applicants have been unable to demonstrate either in the grounds pleaded or in argument any specific unfairness or prejudice relating to them personally arising from the general unfairness which they identify in the subsidiary protection system, nonetheless this case represents one of many where similar hints and suggestions have been raised with increasing frequency. In the circumstances, while recognising deficiencies in the applicants' pleadings, the degree of unease with which the Court views the subsidiary protection process supports the view that these arguments relating to the general unfairness of the subsidiary system should be fully developed and definitively decided.

45. The court is therefore prepared to extend the time for the applicants to bring judicial review proceedings and to grant leave to develop their discrete arguments relating to the unfairness arising from a procedure which (i) does not permit an applicant to apply for subsidiary protection unless he/she is a declared failed asylum seeker; (ii) involves notifying such failed asylum seeker that his right to remain in the State has expired before he/she has had an opportunity to avail of the right to apply for subsidiary protection; (iii) combines a guaranteed right to apply for subsidiary protection with a discretionary power to seek leave to remain on humanitarian grounds; and (iv) fails to ensure that the competency and independence of the decision maker is at least equivalent to that of the asylum decision maker."

11. The court therefore granted leave upon the following grounds which it formulated:

"The procedures applied by the Minister with regard to subsidiary protection are unfair and in breach of natural and constitutional justice, and *ultra vires* Council Directive 2004/83/EC and in breach of general principles of the law of the Union in that:

(1) The applicant is told of his right to apply for subsidiary protection after being told that his right to remain in the State has expired;

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

(3) The applicant cannot bring a claim unless he has been informed by the Minister that he is a failed asylum seeker. The decision to refuse a declaration of refugee status implies that the Minister has already given some consideration to the case and has made a negative determination in relation to the applicant's case. This creates an impression of partiality on the part of the Minister whose officials will also consider the subsidiary protection application;

(4) An application for subsidiary protection is considered during the pre-deportation process, when the Minister has already formed an intention to consider making a deportation order;

(5) The competence, knowledge and training of the civil servant assessing eligibility for the subsidiary protection, a complex legal issue, is not regulated; and

(6) In contrast with asylum applications, subsidiary protection applications are not considered by a person who is independent of the Minister in the performance of his functions."

12. The court specifically rejected a ground that the subsidiary protection procedure was essentially unfair because once such an application is made and failed the applicant lost the right to leave the State voluntarily. It had been submitted that this conclusion arose from the third option offered in the so-called "three option letter" which is set out below. However, the court was satisfied that there was a sufficient interval between the refusal of subsidiary protection and the making of the deportation orders in each case to afford the applicants the opportunity to indicate an intention to leave the country voluntarily before deportation was considered. Therefore, the argument was considered to be without substance.

The Case of V.J.

13. The third named applicant, V.J., in related proceedings, was granted leave to apply for judicial review by way of *certiorari* on 31st July 2012, in respect of the first named respondent's decision to refuse his application for subsidiary protection on 3rd April 2012 *(V. J. (Moldova) v. the Minister* [2012] IEHC 337). He was a failed asylum seeker who arrived in the State in 2008 leaving his children behind. His wife had arrived in the State in 2006. The asylum claim was based on fear of persecution for reasons of political opinion or activity due to the attempt by his wife in 2002/2003 as a member of an opposition party in Moldova to publish a newspaper article which implicated the then President in illegal cross border trading in drugs and alcohol. As a result, he claimed to have been assaulted and that he and his family received threatening phone calls. It was alleged that in Easter 2003 the same people attempted to abduct his wife while holding a knife to his throat. His wife was then said to have escaped and phone calls and threats continued in June 2006. Though he fled to Russia he was able to return to Moldova to visit his mother who was ill. He claimed that he continued to fear the police and was unable to return to Moldova. This claim was rejected on the grounds of lack of credibility. The article referred to does not appear to have been actually published but it is said that the contents were leaked by the newspaper to the President or his son.

14. The application for subsidiary protection was based largely on the same facts and events including the threats associated with his wife's alleged activities. He claimed in his application that he would be exposed to a risk of serious harm under two of the recognised grounds namely (i) the death penalty or execution and (ii) torture or inhuman or degrading treatment. In the course of the application

no new fact or evidence was put forward to that advanced in the asylum process. The subsidiary protection decision cited extensively the conclusion reached by the Tribunal on the credibility issue emphasising the applicant's vagueness about his wife's role and activities. The determination concluded that the claim to fear persecution or serious harm if returned to Moldova was simply not credible. The article said to have been written by his wife was never produced nor did she appear to explain the contents of the article during the asylum process. The application for subsidiary protection was found by Cooke J. to be based exclusively on the assertion of past serious harm and specific circumstances personal to the applicant and his wife. V.J. did not rely on any current state of internal or international armed conflict in Moldova such as might have required a forward looking assessment of the risk by reference to appropriate country of origin information.

15. V.J. was refused a declaration of refugee status and was sent the "three options" letter on 24th September 2009. He made his application for subsidiary protection on 15th October 2009. On the same date he also made an application for leave to remain. Further submissions were made on his behalf in respect of a s. 3 application on 24th November 2009 and in respect of the subsidiary protection application on 6th January 2010. An analysis of the submissions advanced on his behalf concentrated on the credibility issue. The validity of the asylum application and the finding of credibility made therein was not the subject of judicial challenge. He relied on substantially the same facts for the subsidiary protection application and no new facts were advanced to suggest that the credibility determination was incorrect at the asylum stage. Ms. Catriona Kirwan, Executive Officer, prepared a consideration of the case on 30th March, 2012 and recommended that he was ineligible. The recommendation was further considered by Mr. Phelim Cassidy, Higher Executive Officer on 3rd April who determined that he was ineligible. V.J. was notified of the decision by letter dated 5th April. An examination of file was then carried out under s. 3 and Mr. Cassidy recommended that a deportation order be made on 4th April, the day after the subsidiary protection decision. The deportation order was signed by Mr. Noel Waters on the 3rd May 2012 and notified to V.J. by letter dated 10th May. There was approximately one month between the dates upon which the subsidiary protection decision and the deportation order and one month between the dates of notification of each.

16. A number of grounds were advanced when seeking leave but all were rejected except one which Cooke J. addressed as follows:-

> "24. There is, however, in the view of the Court, one ground which, on the basis upon which it was explained to the Court, can be said to raise a sufficiently arguable point to warrant the grant of leave. Ground No. 3, in the statement of grounds is formulated as follows:-
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> > "The enmeshment of the subsidiary protection scheme operated in the State with the deportation/leave to remain procedure is in breach of European Law and renders the refusal of subsidiary protection unlawful. It was in breach of the principles of equivalence and effectiveness."
>
> 25. It seems questionable whether the concept of "enmeshment" is one known to the vocabulary of administrative law. What is being alluded to here, however, is the fact that in the way in which the Qualifications Directive has been implemented by the 2006 Regulations, the opportunity to apply for subsidiary protection has been incorporated into the procedure leading to the making of a deportation order under s. 3 of the Immigration Act 1999. Regulation 4(1) of the 2006 Regulations requires that the notification given by the Minister of a proposal under s. 3(3) of the Act of 1999, to make a deportation order in respect of a failed asylum seeker is to include a statement that if the asylum seeker considers that he or she is a person eligible for subsidiary protection, "he or she may, in addition to making representations under s. (3)(3)(b) of that Act, make an application for subsidiary protection to the Minister within the fifteen day period" stipulated in the notification.
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> 26. In typical if not all cases, the notification under s. 3(3) is given in what is referred to as the "three options letter" in which the failed asylum seeker is informed that the Minister proposes to make a deportation order but offers the asylum seeker a choice between leaving the State voluntarily before any order is made; agreeing to submit to the making of the order and, alternatively, applying for temporary leave to remain and additionally making an application for subsidiary protection. It is argued that by placing the entitlement to apply for subsidiary protection within the context of the choice to be made between these options, the combined effect of Regulation 4(1) and s. 3 is to place an inhibition on the making of an application for subsidiary protection which is incompatible with the scheme of the Qualifications Directive and general principles of European Union law.
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> 27. The Court will, accordingly, grant leave to the applicant to apply for judicial review upon a single ground directed towards this argument to be formulated as follows:-
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> > "By confining the right to apply for subsidiary protection to the circumstance in which the asylum seeker's entitlement to remain lawfully in the State pursuant to s. 9(2) of the Refugee Act 1996, has expired and a decision has been taken to propose the deportation of the applicant under s. 3(3) of the Immigration Act 1999, Regulation 4(1) of the 2006 Regulations in conjunction with s. 3 of the said Act of 1999, has the effect of imposing a precondition or disadvantage upon a subsidiary protection applicant which is *ultra vires* Council Directive 2004/83/EC of the 29th April, 2004, and is incompatible with general principles of European Union law.""

The court will address this ground as part of its consideration of the grounds raised in the applications of the first and second named applicants as it raises substantially the same issues.

17. The court is satisfied that the applicants have locus standi to bring these applications.

The Three Options Letter

18. Following the refusal of their respective applications for asylum and the rejection of their appeals to the RAT a letter was issued to each of the applicants known as "the three options letter". As noted by Clark J. the letter informed the applicants that following the refusal of refugee status their entitlement to stay in the State had expired and the Minister proposed to deport them under s.3 of the 1999 Act as amended. The relevant extracts from the letter are as follows:

> "As a person whose application for asylum has been refused, you may make an application for "subsidiary protection" to the Minister. I enclose an information leaflet on applications for subsidiary protection.
>
> You may also make representations to the Minister, setting out reasons as to why you should be allowed to remain temporarily in the State (section 3(3)(b) of the Immigration Act 1999).
>
> You can apply for subsidiary protection and/or make representations to remain temporarily in the State on the form CP/01

or in a similar format. **Please note that the completed form CP/01 must be signed by you personally, or in the case of a minor, by a parent or guardian.**

You can attach any additional letters or documents from other people in support of your application when you fill in the form. Please contact us immediately if any of the facts you have stated in your application change after you submit it.

If you chose this option, it is very important that you understand the following:

(a) This is the order in which your case will be decided:-

- The Minister will make a decision on your eligibility for subsidiary protection first. If your application for subsidiary protection is successful, you will be allowed to remain in the State for three years (this will be reviewed at the end of three years). If this happens it will not be necessary for your representations to remain temporarily in the State to be considered.

- If your application is not successful or you have not made an application for subsidiary protection, the Minister will decide on your representations to remain temporarily in the State, this will be reviewed at the end of one year.

- If the Minister decides that you should not be allowed to remain in the State, you will be made the subject of a deportation order. You will no longer have the option of leaving the State voluntarily without a deportation order.

(b) Your application for subsidiary protection and/or representations to remain temporarily in the State is not an appeal against the refusal of refugee status.

(c) If you present information in your application for subsidiary protection or representations to remain temporarily in the State that contradicts claims you made in your asylum application, this will be known to the Minister.

(d) Please complete and return the attached Address Notification Form to the address below. This confirms your current address and that you agree to inform the Minister if you change address in the future.

(e) If you **do not apply** for subsidiary protection at the same time as you make representations for leave to remain in the State, such an application will not be considered at a later date.

(f) **It is recommended** that you get independent legal advice before you apply for subsidiary protection and, or make representations to remain in the State." (emphasis in original)

Legal Provisions

Refugee Status

19. Council Directive 2005/85/EC of 1st December, 2005 provides for the minimum standards on procedures in member states of the European Union for granting or withdrawing refugee status (the Procedures Directive). The main object of the Directive is to introduce a minimum framework on procedures for granting and withdrawing refugee status. The Directive requires each member state to ensure that non-nationals of the union have a right to apply for asylum in accordance with the minimum procedures set out therein. Article 7 provides that applicants shall be allowed to remain in the member state for the sole purpose of availing of the procedures until the determining authority has made a decision. Article 39 provides for a right to an effective remedy under the heading of "Appeals Procedures" in Chapter V. Under Article 39(1) member states shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against decisions taken at first instance. Article 39(2) provides that member states shall provide for time limits and other necessary rules for the applicants to exercise his or her right to an effective remedy. Article 39(3) provides that member states shall, where appropriate provide for rules in accordance with their international obligations dealing inter alia with the question of whether the remedy pursuant to para. 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome.

20. The Directive was transposed into national law under the provisions of the Refugee Act 1996 as amended. An initial application is made to the Office of the Refugee Applications Commissioner (ORAC) and its decision may be appealed to the Refugee Appeals Tribunal (RAT) under s. 13(8) of the Act. Section 9 provides that an applicant for asylum shall be entitled to remain in the State until the date upon which notice is sent that the Minister has refused to give him or her a declaration of refugee status under the Act. Under s. 17(5):

> "Where the Minister has decided to refuse to give a declaration, he or she shall send to the applicant a notice in writing stating that—
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> (a) his or her application for a declaration has been refused,
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> (b) the period of entitlement of the applicant to remain in the State under section 9 has expired, and
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> (c) the Minister may make an order under s. 3 of the Immigration Act 1999 requiring the applicant to leave the State and if the notice contains the statement specified in subs. (4) of that section, it shall not be necessary for the Minister to give the notification specified in subs. (3) of that section."

Subsection (6) confers a discretion on the Minister to grant permission in writing to a person whose application has been refused to remain in the State for such period and subject to such conditions as the Minister may specify in writing.

Deportation

21. Section 3 of the Immigration Act 1999 as amended concerns deportation orders. It provides:

> "3. (1) Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996, and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.

(2) An order under subsection (1) may be made in respect of—…
(f) a person whose application for asylum has been refused by the Minister, …
(3) (a) Subject to subsection (5), where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands.
(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall—

(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) notify the person in writing of his or her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands."

The notification of this proposal must include a statement that the person concerned may make the representations and under subs. (4)(b):

"a statement that the person may leave the State before the Minister decides the matter and shall require the person to so inform the Minister in writing and to furnish the Minister with information concerning his or her arrangements for leaving,

(c) a statement that the person may consent to the making of the deportation order within 15 working days of the sending to him or her of the notification and that the Minister shall thereupon arrange for the removal of the person from the State as soon as practicable, and

(d) any other information which the Minister considers appropriate in the circumstances."

Under subs. (5) the provisions of subs. (3) concerning the notification and the right to make representations and to receive notice of the decision and its reasons shall not apply to a person who has consented in writing to the making of the deportation order or a person who is outside the State.

22. The Minister must in determining whether to make a deportation order have regard under subs. (6) to:

"(a) the age of the person;

(b) the duration of residence in the State of the person;

(c) the family and domestic circumstances of the person;

(d) the nature of the person's connection with the State, if any;

(e) the employment (including self-employment) record of the person;

(f) the employment (including self-employment) prospects of the person;

(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person;

(j) the common good; and

(k) considerations of national security and public policy,

so far as they appear or are known to the Minister."

23. The Minister may under s. 3(11) by order amend or revoke a deportation order. Under subs. (10) a person who contravenes a provision of a deportation order is guilty of an offence.

24. It is clear therefore that a person in receipt of a notification of a proposal to deport him / her under subs. 3 may make representations as to why he or she should not be deported, may leave the State before the Minister decides the matter subject to the requirement to inform the Minister in writing and furnish the Minister with information concerning the arrangements made for leaving or indicate that he or she consents to the making of the deportation order following which the Minister must arrange for the removal of the person from the State as soon as practicable.

25. A person who is refused a declaration of refugee status by the Minister also has a right to make an application for "subsidiary protection".

Subsidiary Protection
26. Council Directive 2004/83/EC of 29 April 2004 concerns minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection (the Qualification Directive). Third country nationals or stateless persons are entitled to apply for subsidiary protection status as defined in Article 2(e) and (f). A "person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. "Subsidiary protection status" means recognition by a Member State of a

third country national or stateless person as a person eligible for subsidiary protection. The term "international protection" embraces both refugee and subsidiary protection status. Article 15 addresses the qualification criteria for subsidiary protection in respect of serious harm and states

> "Serious harm consists of:
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> (a) death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
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> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

The provisions of the Directive were transposed into Irish law in the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). Regulation 4 provides:

> "1 (a) A notification of a proposal under s. 3(3) of the Act of 1999 should include a statement that, where a person to whom s. 3(2)(f) of that Act applies considers that he or she is a person eligible for subsidiary protection, he or she may, in addition to making representations under s. 3(3)(b) of that Act, make an application for subsidiary protection to the Minister within the 15 day period referred to in the notification.
>
> (b) An application for subsidiary protection shall be in the like form in Schedule 1 or a form to like effect.
>
> (2) The Minister should not be obliged to consider an application for subsidiary protection from a person other than a person to whom s. 3(2)(f) of the 1999 Act applies or which is in a form other than that mentioned in para. (1)(b).
>
> (3) In determining whether a person is eligible for subsidiary protection, the Minister –
>
> (a) shall take into consideration, in addition to matters mentioned in Regulation 5, any particulars furnished by the applicant under para. (1)(b); and
>
> (b) may take into consideration –
>
> (i) the information or documentation taken into consideration in relation to the determination of the applicant's application for a declaration, and
>
> (ii) such other information relevant to the application as is within the Minister's knowledge.
>
> (4) Where the Minister determines that an applicant is a person eligible for subsidiary protection, the Minister shall grant him or her permission to remain in the State.
>
> (5) Where the Minister determines that an applicant is not a person eligible for subsidiary protection, the Minister shall proceed to consider, having regard to the matters referred to in s. 3(6) of the 1999 Act, whether a deportation order should be made in respect of the applicant.
>
> (6) Nothing in these regulations shall affect the discretionary power of the Minister under s. 3 of the 1999 Act."

A Bi-furcated Procedure

27. Under Article 3(3) of the Procedures Directive where a Member State establishes a unitary procedure in which applications are examined both as applications on the basis of the Geneva Convention for refugee status and applications for subsidiary protection as defined by Article 15, the procedures prescribed in the Directive must be applied throughout the process. Both applications are made at the same time and considered together by the same personnel. Though all other Member States of the European Union adopt a uniform single procedure in which applications for refugee status and subsidiary protection are heard together, the Directive itself clearly permits other forms of procedure involving a two stage process. Ireland was the only country to adopt a two stage process for reasons which have not been made clear to the court. Furthermore, whether the process adopted is unitary or two stage, the Member State must provide a mechanism for the determination of the refugee status application in advance of the application for subsidiary protection. They are separate rights involving different criteria and an application for subsidiary protection may only be considered and granted if the application for refugee status has been refused.

28. It is also clear from the above provisions that during the course of the application for refugee status, the applicant has a legal entitlement to remain in the State. If the application is refused, there is no lawful power to deport the applicant until such time as a deportation order is made in accordance with s. 3 of the Immigration Act 1999 as amended. However, there is nothing to preclude the initiation of the immigration process under s.3 provided the subject of the proposed order is informed of and accorded an opportunity to make a claim for subsidiary protection in accordance with law.

29. I am satisfied that an applicant for refugee status has an enforceable right to remain in the State which continues until such time as notification of refusal to grant refugee status is given to the applicant. Thereafter, the applicant may apply for subsidiary protection as a person who has been refused refugee status under Article 2(f) of the Qualification Directive and s. 3(2) (f) of the 1999 Act as provided by Article 4(2) of the Eligibility for Protection Regulations. Article 4(4) provides that where the Minister determines that the applicant is a person eligible for subsidiary protection, the Minister "shall grant him or her permission to remain in the State". The provision is predicated on the continuing presence of the applicant within the State.

30. Article 4(5) provides that the Minister shall proceed to consider whether a deportation order should be made if it is determined that a person is not eligible for subsidiary protection: it is only at that stage that a decision on deportation may be made. There is clearly a separate and distinct process which provides for the making of relevant decisions in a defined sequence;

> (a) an application for refugee status

(b) an application for subsidiary protection following a refusal to grant refugee status and

(c) a consideration and determination of whether the applicant should be deported only if the application for subsidiary protection is refused.

31. Article 4(1) of the 2006 Regulations provides for notification to be given by the Minister of a proposal under s. 3(3) of the 1999 Act to make a deportation order in respect of a failed asylum seeker. The failed asylum seeker must also be informed that he or she may, in addition to making representations as to why a deportation order should not be made, make an application for subsidiary protection within a fifteen day period. That period was held not to be sufficient to comply with the requirement of "effectiveness" under European Union Law in the case of Danqua in respect of subsidiary protection to which I will later return.

Grounds 1, 2 and 3
32. The joinder of the notification of an entitlement to apply for subsidiary protection status with notification of the entitlement to apply to remain in the State on humanitarian grounds and a request for reasons as to why the applicant should not be deported, is challenged as contrary to the terms, spirit and intention of the right to apply for subsidiary protection. It is said to impose a pre-condition or disadvantage upon the subsidiary protection applicant which is *ultra vires* Council Directive 2004/83/EC and incompatible with general principles of European Union Law. It is submitted that the procedure failed to comply with the principle of "effectiveness and equivalence", is disproportionate, unlawfully discriminatory and violates the right to good administration under Article 41 of the Charter of Fundamental Freedoms. These grounds are based on the fact that the applicants were informed of the right to apply for subsidiary protection only after they were informed that their right to remain in the State had expired and that it was proposed to consider their deportation. It is claimed that the applicants were disadvantaged by being prevented from making their applications for subsidiary protection until after the decision to refuse them refugee status and because their applications would be entertained only after a determination was made proposing to consider their deportation. While the court has considered the submissions made in respect of each of these grounds there is a degree of overlap with others considered later and the single ground advanced in the case of V.J.

The Procedure Followed
33. The affidavit of Ms. Maura Hynes, principal officer with the Department of Justice and Equality sets out the procedure followed in considering an application for subsidiary protection. Ms. Hynes notes that in order to apply for subsidiary protection the applicant must be a failed asylum seeker. The decision as to whether the applicant was entitled to refugee status must be made prior to any decision as to whether that person was eligible for subsidiary protection whichever procedure is in place. The refusal of refugee status therefore does not carry a negative impression in any subsequent consideration of a subsidiary protection application. However, the fact that an applicant has been refused refugee status or the reasons for that refusal are matters which may be considered by the decision maker. The decision maker will consider the application for subsidiary protection on the basis of any submissions and accompanying documentation and will also have regard to the findings made in respect of the applicant in respect of refugee status. This may include findings of lack of credibility on the part of the applicant. She notes that the Refugee Applications Commissioner and the Refugee Appeals Tribunal are bodies which are independent in law whose decisions, if unchallenged, are clearly relevant to the issues surrounding eligibility for subsidiary protection.

34. Under the applicable procedure, Ms. Hynes states that an applicant who is refused refugee status is informed of the right to apply for subsidiary protection under the "three options" letter quoted above. This letter issues after the applicant has been informed of the recommendation to refuse the asylum application by ORAC or following an unsuccessful appeal to the RAT. The applicant is informed of a proposal to make a deportation order following the refusal of refugee status. An applicant may respond in three ways to this letter. Firstly, the applicant may choose to leave the State voluntarily before a decision is made to deport him/her. Secondly, the applicant may consent to the making of a deportation order. Thirdly, the applicant may choose to exercise his/her right to apply for subsidiary protection in accordance with the statutory regulations and/or to submit representations to the Minister under s. 3 of the Immigration Act 1999 setting out reasons as to why the applicant should be allowed to remain temporarily in the State. A response was expected within fifteen days.

35. If the third option is followed and the applicant avails of the right to apply for subsidiary protection, the letter then describes the order in which the case will be processed. Ms. Hynes notes that the letter states clearly that the Minister will first make a decision on the applicant's eligibility for subsidiary protection and if that is successful, the applicant will be allowed to remain in the State for a period of three years, reviewable at the end of that period. If the application is not successful or no application for subsidiary protection is made, representations to remain temporarily in the State under s. 3 of the Immigration Act "will be considered". If these representations to remain are refused, the applicant will be made the subject of a deportation order. At that stage the applicant is informed, he/she "will no longer have the option of leaving the State voluntarily without a deportation order". Thus the letter informs the applicant of the sequence in which the various determinations will be made. The application for subsidiary protection will be considered first and determined before the decision maker proceeds to consider and decide upon any submissions in respect of humanitarian leave to remain under s. 3 and whether a deportation order should be made.

36. Ms. Hynes also states that a person who makes an application for subsidiary protection cannot be removed from the State until a deportation order has been made in respect of him/her, and no such order will be made until the subsidiary protection application has been considered and determined. The applicant will be allowed to remain in the State while the subsidiary protection application is being decided.

37. Ms. Hynes emphasises that the decision in respect of a deportation order is not made prior to or at the same time as a decision on a subsidiary protection application. The latter application must be determined in advance of any consideration of, or decision to make, a deportation order. The first named respondent in considering a subsidiary protection application may not and did not decide at that time that the applicants concerned would be deported.

38. Ms. Hynes also outlined the decision making process in respect of subsidiary protection applications at paras. 31 to 35 of her affidavit. The case worker carries out a detailed assessment of the facts and circumstances in relation to the serious harm claimed by the applicant in respect of the qualification criteria set out in Council Directive 2004/83/EC quoted above. She accepts that if credibility issues arose earlier in the asylum process, particularly in the context of an unsuccessful appeal to the Refugee Appeals Tribunal, such issues are examined insofar as they impinge on the claim of serious harm that has been made by the applicant. She states:-

> "In this regard credibility issues that go to the core of the serious harm claimed, are examined in particular detail and serious inconsistencies that have come to light which were not addressed at the asylum stage are generally put to the Applicant for comment to ensure compliance with fair procedure. If there are no credibility issues arising, then this is stated in the submission of the case worker."

39. Ms. Hynes states that the case worker takes into account all evidence and matters while paying special regard to country of origin information concerning the existence of situations of armed conflict and that the applicant is a non-combatant civilian. Evidence of threats of indiscriminate violence which is serious and individual, is also considered and examined by the case worker. Relevant statements and documentation pertaining to the application are examined with the individual position and personal circumstances of the applicant in order to determine whether the acts to which the applicant has been or could be exposed would amount to serious harm.

40. Ms. Hynes emphasises the independence of the case worker and other officials when carrying out their functions and that there is no interference by the Minister with the case worker in carrying out a full and fair assessment of the subsidiary protection application. Furthermore, it is emphasised that there is no obligation under European Union or national law for the assessment of subsidiary protection applications by persons who are not employed as civil servants of the first named respondent in the performance of their functions.

41. If an applicant is dissatisfied with a decision refusing subsidiary protection status, he/she is entitled to an effective remedy pursuant to Article 47 of the EU Charter of Fundamental Rights. This is provided by way of access to judicial review by the High Court under O. 84 of the Rules of the Superior Courts. It is submitted that the applicants did not make any representation suggesting in any way that they were prejudiced or disadvantaged as a result of the procedure adopted in respect of the subsidiary protection application nor is there any evidence of such prejudice or disadvantage.

42. Ms. Hynes accepted that the subsidiary protection application and the application for leave to remain were considered in close succession. They were clearly separate and identifiable procedures involving decisions based on different criteria. She stated that if a case worker recommends the refusal of subsidiary protection and the manager approves this recommendation, the applicant and his/her legal representative will be notified of the refusal. He/she is notified by letter and given a copy of the consideration. The recommendation is forwarded to an assistant principal officer for a decision in any complex case.

43. If the application for subsidiary protection is refused, the case worker then proceeds to draft a recommendation in respect of the s. 3 application for leave to remain. Though the representations may be considered in close succession this, it is said, is due to an efficient use of the case worker's time. Ms. Hynes emphasised, however, that the subsidiary protection application is always completed prior to any examination of the s. 3 representations. In addition, a second official assessing the recommendation will always consider the subsidiary protection application and recommendation first, in advance of consideration of the deportation issue.

44. At this point it is important to note that the applicants consider themselves disadvantaged because they were not given an option to leave the country voluntarily upon the refusal of subsidiary protection. They submit that they had to forgo that possibility once they elected to apply for subsidiary protection. This is incorrect. An applicant may leave the country voluntarily between the date of the refusal of subsidiary protection and the making of a deportation order though that period may be relatively short.

45. The final stage as described by Ms. Hynes follows a decision to refuse leave to remain pursuant to section 3. If the making of a deportation order is recommended, it is forwarded with the entire file to the first named respondent or to the director general of the Irish National Naturalisation and Immigration Services (INIS) for a decision to sign the deportation order or not. It is then for the first named respondent or the director general to decide whether or not to sign the deportation order or take some further action, for example, by seeking clarification on some issue or directing that permission to remain be granted.

46. Ms. Hynes also deposes that the assessment and consideration of applicants for subsidiary protection was carried out by trained and experienced personnel. She notes that there is no specific requirement pursuant to European Union law or national law for the regulation of the competence, knowledge and training of the officials but outlines in detail the ongoing training for case workers dealing with subsidiary protection applications. She states that the case workers who deal with subsidiary protection applications have built up a considerable amount of expertise and developed a specialisation in dealing with particular countries such as those which have a high level of subsidiary protection applications, including the Democratic Republic of Congo, Nigeria and Somalia. A significant amount of knowledge has been acquired by the case workers through experience, coaching and mentoring between case workers and their managers. Appropriate source material is used: for example, a strict policy is applied to country of origin information upon internet sites which are not to be used because they are unreliable.

47. The case workers have access to the Refugee Documentation Centre operated by the Legal Aid Board and materials and updates received from the Centre are forwarded to all case workers. The Department of Justice and Equality has two representatives on the Steering Committee of the Documentation Centre and there is regular engagement between the Department and the Centre. Regular case conference sessions are held at which recent developments in case law and the jurisprudence of the courts is brought to the attention of case workers. These are incorporated, where appropriate into subsidiary protection assessments by the case workers. It is claimed that the case workers are provided with ongoing training with appropriate research facilities. The court notes that no specific claim of inexperience, incompetence or inability to deal with subsidiary protection applications has been made and no evidence has been produced to substantiate any such assertion generally or in respect of any of the applicants' cases.

48. The court is satisfied that the procedures outlined by Ms. Hynes in her affidavit were applied in each of the applicants' cases. There is no prescribed procedure to be applied under Directive 2004/83/EC (*Case C – 277/11 M.M. v. Ireland*, judgment 22nd November 2012 paras. 72 to 73). The State is entitled to establish a system whereby an application for subsidiary protection may be examined separately from an asylum application and subsequent to it. The separate state process is permitted under Article 3(3) of Directive 2005/85/EC. A two stage process is *prima facie* lawful if otherwise in compliance with the provisions of the two Directives and the transposing statutes and regulations as applied and interpreted harmoniously with European Union Law.

Effectiveness and Equivalence

49. The applicants accept that the State may prescribe procedures for giving effect to the rights of asylum and subsidiary protection seekers. It is submitted however, that the rules applicable under the subsidiary protection application procedure make it "excessively difficult" for applicants to fully exercise their rights (*Case-C279/09 D.E.B. v Germany,* [2010] ECR I-1). In particular, it is claimed that the applicants were obliged to submit their applications in the knowledge that a proposal had already been made to deport them. If they were refused it was inevitable that they would be excluded from the State for life. It is submitted that an effective right to apply for subsidiary protection should be completely divorced from an application for leave to remain in the State under the immigration and deportation process under s. 3 of the Immigration Act 1999 as amended. The applicants claim that the failure to do so breaches the principle of effectiveness under European Union Law.

50. The applicants also submit that the connection made by the State between the subsidiary protection applications under the immigration/deportation procedure breaches the principle of equivalence under European Union Law. The principle requires that where a member state is obliged to provide procedural rules necessary for the protection of European Law Rights, the national procedural

rules must not be less favourable than those applicable to the protection of comparable domestic rights. It is submitted that the Irish application for refugee status is a valid comparator for the purpose of determining procedural equivalence. The applicants contrast the position of an applicant for asylum who enjoys permission to be in the State until the determination of the asylum process and cannot be the subject of a proposal to deport and an applicant for subsidiary protection who is rendered "unlawfully in the State" and is the subject of a proposal to deport throughout his/her application. If unsuccessful, he/she will not only be the subject of a negative determination but also a deportation order with no option of voluntary return. It is claimed that an unsuccessful refugee applicant has the option to leave the country with the possibility of voluntary return. Consequently, it is claimed that the principle of equivalence under European Law has been breached because the rules applicable to the subsidiary protection applicant are less favourable (*Paquay*, C-460/06 [2007] ECR 1-8511).

51. In Case *C- 429/15 Danqua v. Minister for Justice and Equality* (20 October 2016) the CJEU considered whether the principle of effectiveness precluded a national procedural rule which required that an application for subsidiary protection be made within fifteen working days of notification that the applicant's application for refugee status had been rejected. The court determined that national procedural rules should not render the exercise of rights conferred by the EU legal order impossible in practice or excessively difficult. Thus procedural rules must ensure that an applicant for subsidiary protection is actually placed in a position to avail themselves of the rights conferred by Directive 2004/83. The question is whether the applicant is "in concrete terms" placed in a position to assert those rights including the right to submit an application for subsidiary protection. The court restated that when reviewing a national procedural rule, the role of the rule in the procedure and its conduct and special features viewed as a whole before the national body must be considered. The court must take into account where relevant the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure.

52. The court held that the time limit of fifteen days was capable of compromising the ability of applicants for subsidiary protection "actually to avail themselves of the rights conferred on them by Directive 2004/83" and stated

> "46. In that context and taking account of the difficulties such applicants may face because of, *inter alia*, the difficult human and material situation in which they may find themselves, it must be held that a time limit, such as that in issue in the main proceedings, is particularly short and does not ensure in practice, that all those applicants are afforded a genuine opportunity to submit an application for subsidiary protection and, where appropriate, to be granted subsidiary protection status. Therefore, such a time limit cannot reasonably be justified for the purpose of ensuring the proper conduct of the procedure for examining an application for that status.

47. That conclusion, moreover, cannot be called in question by the need to ensure the effectiveness of return procedures, since the time limit at issue in the main proceedings is not directly linked to the return procedure, but to the rejection of the application for refugee status."

53. The Court of Appeal in *Danqua v. Minister for Justice and Equality* (No. 2) [2017] IECA 20 considered the effect of the CJEU's decision in that case. The fifteen day rule was inconsistent with European Union law and was no longer legally operative and could no longer form the basis of any administrative decision which presupposed that the rule in general had full force and effect. It could no longer provide the legal basis for any administrative decision which had previously sought to apply the rule on the basis that it was of full force and effect. This is not such an administrative decision. In *Danqua* the application of the rule was central to the issues in the case. That is not so in these proceedings.

54. The court is satisfied that the principle of effectiveness under European Union Law in respect of subsidiary protection requires that the right to apply for subsidiary protection be secured "in concrete terms". It is abundantly clear from the evidence that each of the applicants was given a full opportunity to make an application for subsidiary protection after the refusal of their respective applications for refugee status. The Minister, under the Regulations, was not obliged to consider an application for subsidiary protection from a person who had not been refused asylum in accordance with the definition of a person eligible for subsidiary protection under Article 2 of Directive 2004/83/EC. Furthermore, Article 7 of Directive 2005/85/EC provides that applicants should be allowed to remain in the member state for the sole purpose of the asylum procedure until a decision has been made. A similar procedure applies in other member states to applications for subsidiary protection if made as part of a unitary process. Ireland does not apply a unitary process and the provisions of Article 7 do not apply to subsidiary protection applications in Ireland. However, this does not mean that an applicant for subsidiary protection may be removed from the State during the application process.

55. In this case each applicant had a full opportunity to make submissions in respect of their applications for subsidiary protection. There is no evidence to support the proposition that the exercise of their rights was made "impossible" or "excessively difficult" in a manner that would contravene European Union Law. There is nothing in the affidavits submitted on behalf of the applicants to indicate how or to what extent they were inhibited or prevented from exercising the right to make an application for subsidiary protection because of the proposal to consider their deportation.

56. Each application was considered in advance of the application for leave to remain. It was never envisaged that the applicants would be deported prior to the completion of the subsidiary protection process or that a decision would be made about their deportation prior to the conclusion of that process. That was made explicitly clear to each of the applicants and it was the process followed on the evidence adduced. The applications for leave to remain were made at the same time under s. 3 of the Immigration Act 1999 as amended. However, the applicants could not be deported unless a deportation order was made against them. This required a separate consideration of their applications for leave to remain on distinct criteria which were different to those upon which subsidiary protection was determined. When refused subsidiary protection, the negative deportation decision did not follow as a matter of course or as a "penalty" and it is entirely inappropriate to describe the process in that way. I am satisfied that though these applications for subsidiary protection were made at a time when the applicants were subject to a proposal to deport, they were not determined on the basis of that proposal which had no bearing on the examination of the subsidiary protection applications. The deportation issue was considered after the subsidiary protection application has been determined and was not made as a result of a failed application for subsidiary protection. It was made in accordance with defined and specific criteria under s. 3 of the 1999 Act. It is also clear on the evidence that the applicants remained in the state following the refusal of their applications for subsidiary protection and made further submissions in relation to their leave to remain applications. As noted by Clark J. in the application for leave the applicants were not deprived of an opportunity to leave the state voluntarily if they so wished between the date of refusal of subsidiary protection and the consideration of the making of the deportation order and the learned judge refused leave on that specific ground.

57. The provisions of the Directive and in particular Article 3(3) of the Procedures Directive permits that the procedure applicable in respect of applications for asylum and subsidiary protection may differ. The court is satisfied that no identifiable prejudice is alleged or arises from these procedural differences.

58. It is simply incorrect to state that a deportation order will follow as a matter of course as a consequence of a refusal of subsidiary protection. The court is satisfied that there is no disadvantage or prejudice visited on a failed applicant for subsidiary protection by reason of the proposal to deport notified to them at the same time as he/she is informed of the right to make an application for subsidiary protection. The court is not satisfied that the procedure adopted and applied by the respondents to applications for subsidiary protection in these cases fails to comply with the principle of effectiveness or to ensure that the rights of the applicants were not protected "in concrete terms" in that regard.

59. The issue of equivalence was considered by Cooke J. in *B.J.S.A. v. the Minister for Justice and Equality* [2011] IEHC 381 in which a similar claim was made that there was a breach of the principle because a right of appeal existed in asylum cases, (said to be the appropriate comparator) but not in cases of subsidiary protection under the separate procedure applicable in Ireland. In a unitary process a right of appeal would have applied. Cooke J. (at paras. 24 to 30) rejected this submission noting that the superior remedy said to have been brought about by national law was in fact brought about by European Union Law. The learned judge also emphasised that the source of the law permitting separate procedures was also European Law. This is the same approach adopted by the CJEU in Danqua in rejecting the same argument on the issue of equivalence

60. The court does not accept that the principles of effectiveness or equivalence have not been observed in the procedures applicable to subsidiary protection in Ireland.

Proportionality
61. The applicants submit that the procedures adopted under the three options letter have a number of adverse consequences for the applicants. It is said that deportation is an inevitable consequence of a refusal of subsidiary protection. It is asserted that deportation gives rise to a lifelong re-entry ban. The procedures are described as "concomitant". It is submitted that the applicants ought to have been afforded an opportunity to apply for subsidiary protection; if unsuccessful, they should have been given the opportunity to leave the State voluntarily rather than be treated as persons unlawfully in the State. They should not have been obliged to make their applications under the shadow of a proposal to deport them. It is said that the proposal to deport at this juncture constitutes a failure to provide the effective protection envisaged under the Directive for subsidiary protection. The consequential deportation of a failed applicant is said to stem from the procedure put in place by the State and amounts to a penalty which is disproportionate and not necessary in a democratic society.

62. The applicants are incorrect in describing the procedures as concomitant. The relevant paragraph of the three options letter arises in circumstances where Article 7 of the Directive no longer applies and the application for asylum has been refused. That does not mean that the applicants may be removed from the State by deportation order at that juncture; the procedure follows a logical sequence. It was indicated to the applicants that there was a proposal to consider their deportation but they had a right to apply for leave to remain under s. 3 of the 1999 Act. They also had a right to apply for subsidiary protection of which they were explicitly informed. Furthermore, they were informed that if they made an application for subsidiary protection, it would be considered first. They would not be removed from the State without an order for deportation. It was made abundantly clear that the issue of deportation would not be considered unless there was a refusal to grant subsidiary protection. Of course, if the subsidiary protection application were to succeed, the applicants would have a right to remain in the State. The decision on deportation was not made until after the refusal of subsidiary protection. The deportation orders were considered and made pursuant to an entirely separate process which cannot in any sense be regarded as a penalty or sanction resulting from a refusal of subsidiary protection.

63. In constructing this argument, the applicants characterise the order of deportation as one which involves a lifelong exclusion from the State. This is an entirely incorrect characterisation and ignores the well established limitation on an order of deportation under the provisions of s. 3(11) of the Immigration Act 1999 and the facility which is open to any deportee to apply for its revocation. The "lifelong ban" description advanced in respect of the alleged disproportionately of deportation orders was rejected in a challenge to the constitutional validity of s. 3 which was fully considered in *S. v. the Minister for Justice, Equality and Law Reform* [2012] IEHC 244 (at pages 35 to 44) later affirmed by the Supreme Court. The court also refused a declaration that s. 3(1) of the 1999 Act was *per se* incompatible with the State's obligations under the European Convention of Human Rights. Furthermore, these submissions were expressly rejected as a discrete ground upon which to grant leave in the initial application ruled by Clarke J. in respect of the first and second applicants. The court does not accept the applicants' submissions in this regard nor does it accept that the procedure has a chilling or discouraging effect on applicants for subsidiary protection. There is no credible evidence of any such effect in the applicants' cases.

64. The court is not satisfied that the suggested prejudicial connection of the deportation process to the decision on subsidiary protection has been established. The applicants have also failed to establish that the procedures are so closely interwoven as to deny the applicants their right to apply for subsidiary protection or to relegate it to a grace and favour status or otherwise preclude or inhibit or disadvantage them in its exercise.

Right to Good Administration
65. Article 41 of the Charter of Fundamental Rights is entitled "right to good administration" and provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable period of time by the institutions, bodies, offices and agencies of the Union. It is undoubtedly the case that the election by the State to provide a two stage procedure in respect of applications for asylum and subsidiary protection gives rise to inevitable delay. In respect of the first and second applicants more than two years passed between the consideration of the application for asylum and subsidiary protection. In *M.M. v. the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Case C-277/11 Opinion of the Advocate General, 26th April 2012) Advocate General Bot opined that a period of two years and three months in respect of that applicant's claim for international protection was "manifestly unreasonable" based on the right to good administration which was one of the general principles of European Union Law.

> "That length of time seems to me to be manifestly unreasonable. Although in Ireland examination of the application for subsidiary protection is not subject to the procedural rules mentioned in Article 23 (2) of the Directive 2005/85 - which provides that member states must ensure that the procedure for examining applications for international protection is concluded as soon as possible and, where a decision cannot be taken within six months, that the applicant is either informed of the delay or receives information on the timeframe… the fact remains that the competent national authority is obliged to ensure, when it adopts a decision falling within the scope of EU Law, observance of the right of the person concerned to good administration, which constitutes a general principle of EU Law."

66. It is to be noted that the specific grounds upon which leave was granted do not contain a ground relating to delay arising from the operation of a two stage process. No specific prejudice has been pleaded in relation to the delay in respect of the subsidiary protection decisions. These applications should be determined with reasonable expedition having regard to the circumstances of the particular case. Undoubtedly, following the initiation of judicial review proceedings in each of these cases considerable delay followed,

created partly by the court permitting an amendment of the grounds to cover the issues raised in *M.M.* which had been initially adjourned on the application for leave. The issue raised in *M.M.* was subsequently the subject of two references to the CJEU. The court has the benefit of the judgment of the advice of the CJEU in respect of the second reference and following further argument is now in a position to adjudicate finally on the same related issue which arises in these cases. The court is not satisfied that the applicants are entitled to relief on this ground.

Discrimination
67. The issue of discrimination is not the subject of the grounds upon which leave was granted by Clark J. It is submitted that the difference in treatment by the State of applicants for asylum and subsidiary protection applicants constitutes unlawful discrimination contrary to Article 14 of the European Convention on Human Rights and Article 21 of the Charter of Fundamental Freedoms. There is simply no basis for these submissions. Apart from the fact that leave was not granted on this ground, the court is satisfied that Article 3(3) of the Directive clearly permits Ireland to have a two stage procedure which, of course, may have different features.

Credibility Findings-Ground 2
68. In respect of ground 2, it is submitted that the applicant carried findings of a lack of credibility with them from the asylum process into the subsidiary protection process thereby creating a negative impression from the outset on the decision maker. This is said to be unfair. It is submitted that in other Member States where there is a unitary procedure, the same decision maker assesses the credibility of the claim and then decides whether an applicant qualifies for refugee status and if not, whether he or she qualifies for subsidiary protection. In Ireland, the subsidiary protection decision maker is not the same person who decided the refugee claim. Thus, if there is a finding of lack of credibility, it is submitted that it is unfair and unlawful for the decision maker on a subsidiary protection application to adopt this finding and apply it to the subsidiary protection decision.

69. The court also granted leave to the applicants to amend their respective grounds by the addition of the following ground based on the first M.M. ruling by the CJEU on 22nd November 2012:

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

70. These issues were considered in two judgments of the CJEU following references made by the High and Supreme Courts. In *Case C-277/11 M.M. v. Minister for Justice, Equality and Law Reform* (22nd November 2012) the CJEU was asked by the High Court (Hogan J.) for a preliminary ruling on the following question:-

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

The CJEU determined that the requirement to cooperate with an applicant under Article 4(1) did not require the competent national authority to inform the applicant that it proposes to reject his application and notify him of the arguments on which it intends to base its rejection, so as to enable him to make known his views in that regard.

71. The court went on to consider a question which it held was raised more generally in the course of the proceedings concerning "the right of a foreign national to be heard in the course of examination of his second application (for subsidiary protection) when that application is made following rejection of an initial application (which sought refugee status)". The court considered whether, in a situation where there are two separate procedures for examining asylum applications and subsidiary protection applications, it is unlawful under EU law not to hold a further hearing in the course of examination of the second application and prior to a refusal of that application on the ground that the applicant has already been heard during the procedure relating to the first application for refugee status. Directive 2005/85 does not apply to applications for subsidiary protection unless a Member State establishes a single procedure in which an application is examined in respect of both forms of international protection, namely, asylum and subsidiary protection. Where both are considered in a single procedure the rules set out in the directive must be applied throughout in respect of applications for both forms of protection. In Ireland's case the application for subsidiary protection is not part of a single procedure and the court noted that Irish law required observance of the safeguards and rules set out in Directive 2005/85 solely in relation to the examination of applications for refugee status. The right to be heard in those circumstances was considered as follows:-

> "81 In that regard, it must be recalled that observance of the rights of the defence is a fundamental principle of EU law (see, inter alia, Case C 7/98 *Krombach* [2000] ECR I 1935, paragraph 42, and Case C 349/07 *Sopropé* [2008] ECR I 10369, paragraph 36).
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> 82 In the present case, with regard more particularly to the right to be heard in all proceedings, which is inherent in that fundamental principle (see, to that effect, inter alia, Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, paragraph 7, and Case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraph 32), that right is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 thereof, which guarantees the right to good administration.
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> 83 Article 41(2) of the Charter provides that the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, and the obligation of the administration to give reasons for its decisions.
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> 84 It must be stated that, as follows from its very wording, that provision is of general application.
>
> 85 Thus the Court has always affirmed the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person (see, inter alia, Case 17/74 *Transocean Marine Paint Association v. Commission* [1974] ECR 1063, paragraph 15; *Krombach*, paragraph 42; and *Sopropé*, paragraph 36).
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> 86 In accordance with the Court's case law, observance of that right is required even where the applicable legislation does not expressly provide for such a procedural requirement (see *Sopropé*, paragraph 38).

87 The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely (see, *inter alia*, Case C 287/02 *Spain v Commission* [2005] ECR I 5093, paragraph 37 and case law cited; *Sopropé*, paragraph 37; Case C 141/08 P *Foshan Shunde Yongjian Housewares & Hardware v Council* [2009] ECR I 9147, paragraph 83; and Case C 27/09 P *France v People's Mojahedin Organization of Iran* [2011] ECR I 13427, paragraphs 64 and 65).

88 That right also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision (see Case C 269/90 *Technische Universität München* [1991] ECR I 5469, paragraph 14, and *Sopropé*, paragraph 50); the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence.

89 It follows from the foregoing reasoning that the right, thus understood, of the applicant for asylum to be heard must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System.

90 In that regard, the Court cannot accept the view put forward by the referring court and Ireland that, where – as in Ireland – an application for subsidiary protection is dealt with in a separate procedure, necessarily after the rejection of an asylum application upon conclusion of an examination in which the applicant has been heard, it is not necessary for the applicant to be heard again for the purpose of considering his application for subsidiary protection because the formality of a hearing in a sense replicates the hearing which he has already had in a largely similar context.

91 Rather, when a Member State has chosen to establish two separate procedures, one following upon the other, for examining asylum applications and applications for subsidiary protection, it is important that the applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures.

92 Furthermore, that interpretation is all the more justified in a situation such as that of the case in the main proceedings since, according to the information provided by the referring court itself, the competent national authority, when stating the grounds for its decision to reject the application for subsidiary protection, referred to a large extent to the reasons it had already relied on in support of its rejection of the asylum application, although, under Directive 2004/83, the conditions which must be fulfilled for the grant of refugee status and for the awarding of subsidiary protection status are different, as is the nature of the rights attaching to each of them.

93 It should be added that, according to the Court's settled case law, the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law (see Joined Cases C 411/10 and C 493/10 *N.S. and Others* [2011] ECR I 13905, paragraph 77).

94 It is in the light of that guidance as to the interpretation of EU law that it will be for the referring court to determine whether the procedure followed in the examination of Mr. M.'s application for subsidiary protection was compatible with the requirements of EU law and, should it find that Mr. M.'s right to be heard was infringed, to draw all the necessary inferences therefrom."

72. The court therefore answered the question which it had framed as follows:-

"… However, in the case of a system such as that established by the national legislation at issue in the main proceedings, a feature of which is that there are two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, it is for the national court to ensure observance, in each of those procedures, of the applicant's fundamental rights and, more particularly, of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection."

73. The proceedings then returned to the High Court to determine the implications of the preliminary ruling. In *M.M. v. the Minister for Justice and Law Reform* [2013] 1 I.R. 370, Hogan J. addressed the implications of the ruling for the standard of fair procedures applicable to a subsidiary protection application. The applicant in *M.M.* was a Rwandan national who applied for asylum which was refused. The Refugee Appeals Tribunal rejected the applicant's claim on general credibility grounds saying that it was difficult to believe aspects of his story. Those conclusions were never challenged in judicial review proceedings. The applicant had the benefit of a personal interview before the Office of the Refugee Applications Commissioner but the appeal before the Tribunal was in writing only. Following the receipt of a three options letter, the applicant made an application for subsidiary protection. This application was supported by the supply of further material but was essentially based on the same grounds which had already been advanced and rejected in the course of the asylum application. The subsidiary protection application was refused. This was then challenged by way of judicial review. The court noted that the CJEU rejected the applicant's argument concerning the interpretation of Article 4(1) but went somewhat beyond the scope of the referred question in addressing the issue of whether a further hearing of the applicant in the course of the examination of the application for subsidiary protection was required.

74. Hogan J. having considered the paragraphs of the preliminary ruling quoted above interpreted them as follows:-

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

> 32 The conclusion is underscored by the Court of Justice's express reference (at para. 92 of the judgment) - with evident disapproval - to the fact that the Minister had relied on the adverse credibility findings made in the asylum application as a ground for rejecting the subsidiary protection application. Here it may be appropriate to discuss two recent important decisions of this court dealing with the relationship between asylum on the one hand and subsidiary protection on the other, *Debisi v. Minister for Justice* [2012] IEHC 44, and *Barua v. Minister for Justice* [2012] IEHC 456)."

75. In *Barua v. Minister for Justice and Equality* [2012] IEHC 456, the applicant's asylum application was rejected on credibility grounds. A number of documents had been submitted during the asylum process which the applicant claims supported his claim but were not subjected to any analysis in the asylum claim. In the subsequent subsidiary protection claim, the applicant submitted that he was relying on all documentation already submitted in the asylum process. No consideration was given to these documents other than it was said that they had been considered. Once again, the subsidiary protection application was determined on the basis of the applicant's credibility. The decision maker relied upon the findings of the Refugee Appeals Tribunal in respect of credibility. Mac Eochaidh J. rejected the proposition that there could be such reliance without examination of the documentation furnished. The learned judge stated at para. 27:-

> "… if documents which are *prima facie* corroborative of an applicant's account of relevant events are to be discounted, dismissed or rejected, or somehow found not to have corroborative effect, it is incumbent on the decision maker to explain why. There may be overwhelming reasons, unrelated to the documentation, to reject the credibility of an applicant but if this is so, then the decision maker should say that and should clearly state the basis on which documentation which seemingly supports the applicant's story is discounted, rejected or dismissed."

76. A similar conclusion was reached by this Court in *AMN v. Refugee Appeals Tribunal* [2012] IEHC 393. Both decisions concerned the proper consideration of documentation which proved central to the conclusion of lack of credibility.

77. In *N.D. v. Minister for Justice and Law Reform* [2012] IEHC 44, Cooke J. accepted that a decision maker in a subsidiary protection application could have regard to the s. 13 report prepared by ORAC or indeed the decision of the Refugee Appeals Tribunal on appeal if the asylum seeker's claim had been found to be implausible or lacking in credibility. The applicant disputed findings of lack of credibility in the s. 13 report. His appeal to the Refugee Appeals Tribunal had been withdrawn in advance of his application for subsidiary protection. It was submitted to the Minister that there was a heightened requirement on the Minister to afford extra vigilance in the application and to adopt a more thorough and engaging approach to it because of the absence of any secondary or appellate consideration of the applicant's refugee status application. It was also submitted that there had been no engagement with the representations made in the subsidiary protection application which sought to address each of the credibility findings. In effect, the applicant sought to challenge the negative findings on credibility in the s. 13 report and to invite the respondent to determine that application on the basis of his explanations as to why he should have been believed. Cooke J. stated as follows:-

> "13. Although Regulation 4 (1)(a) of the 2006 Regulations requires a deportation proposal made under s. 3(3) of the Act of 1999, to invite a failed asylum seeker to make a separate application for subsidiary protection when the refusal of refugee status under s. 17(1) has been decided, the process remains, in the judgment of Court, a continuing and coherent examination of the status of the applicant in international and European Union law in which the Minister as the decision maker in respect of subsidiary protection is entitled – and indeed obliged – to take into account the findings made in the asylum process and which have of course been accepted by him as the basis for his refusal of the declaration under s. 17(1) of the Act of 1996.
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> 14. The scheme of the 2006 Act when taken in conjunction with the provisions of the Acts of 1996 and 1999 in complementing the asylum process, presupposes that the application for subsidiary protection will have been examined in the first instance during the asylum process before it comes to be considered under the Regulations by the Minister. It follows, in the view of the Court, that where the s. 13 Report (or for that matter the decision of the Tribunal on appeal) has found that an asylum seeker's claim is implausible or lacks credibility such that the events described or the facts relied upon are considered not to have happened or not to have involved the applicant, there is no obligation on the Minister to reconsider the same facts or events and to decide whether they should be considered plausible or credible in the light of explanations given in the application for subsidiary protection; at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers. To require the Minister to do so would effectively convert an application for subsidiary protection into a form of a second appeal against the refusal of a declaration of refugee status.
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> 15. It would also in the view of the Court, lead to the inherently contradictory result that in a case where an asylum claim based on past persecution for a specific Convention reason (race, religion, political opinion etc.) had been rejected on grounds of lack of credibility as to the events or facts relied upon, a challenge to those findings made in an application for subsidiary protection would require the Minister to decide not whether the applicant was eligible for that protection but whether the applicant was a refugee. It is a precondition of the admissibility of an application for subsidiary protection that the applicant is not a refugee.
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> 16. It is nevertheless a necessary consequence of the legislative choice made to implement the provisions for subsidiary protection without a unified procedure before a single decision-maker and to invite the failed asylum seeker to make a distinct application that instances, even if rare, may arise in which an applicant will seek to rely upon a risk of harm from a source not previously considered in the asylum process. In such cases it will fall to the decision-maker in the subsidiary protection process to assess that claim as it is made and, where its assessment requires an evaluation of the personal credibility of the applicant, it may well be that the principle of fair procedures will require the decision-maker to interview the applicant for that purpose. Nothing in the 2006 Regulations precludes that being done. This however, is not such a case because the application for subsidiary protection is based upon an alleged fear of risk of serious harm and it is based upon the same source, person and events as had previously been rejected as incredible in the asylum process.
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> …
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> 19. The matters advanced … as the basis for the subsidiary protection application by way of challenge to the credibility findings in the s. 13 Report, are in reality an elaboration of the same facts and events relied upon in the asylum claim and at the s. 11 Interview. In effect the Minister is being asked to reconsider the issue of credibility and come to a different conclusion.
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> 20. In the judgment of the Court, this is not the function of the respondent when dealing with an application for subsidiary protection which is based on the same facts and events considered and determined in the s. 13 Report (or for

that matter in a Tribunal appeal decision) and which the Minister has accepted as the basis for the decision refusing a declaration of refugee status under s. 17(1) …. If findings of fact, including findings of lack of credibility, are to be challenged as has been sought to be done in this case, that challenge must be made by way of appeal to the Tribunal. Where personal credibility is in dispute, it is by means of the independent assessment of the Tribunal member at an oral hearing that the dispute falls to be resolved in the scheme of the 1996 Act and the 2006 Regulations. This is so in the judgment of the Court, even in a case in which it is accepted that the facts and events relied upon, will not establish the existence of a Convention nexus even if they are found to be credible.

…

22. It follows in the judgment of the Court, that where factual claims including those turning on credibility, have been examined and rejected in the asylum process and have formed the basis of the Minister's refusal of the declaration which is a precondition to the subsidiary protection application, the Minister cannot be compelled by the making of the latter application to reopen and reconsider the same facts, events and assertions. This can only be done, in the judgment of the Court, by means of the statutory appeal to the Refugee Appeals Tribunal."

78. Ms. Hynes in her affidavit states that if credibility issues arise which go to the core of the serious harm claim, they are examined in detail, and serious inconsistencies that have come to light which were not addressed at the asylum stage are generally put to the applicant for comment to ensure compliance with fair procedures. If there are no credibility issues arising, then this is stated in the submission of the case worker. Similarly, if country of origin information comes to the attention of the decision maker it has been acknowledged by the High Court that, as a matter of fair procedures, this must be put to the applicant and he/she must be given an opportunity to comment upon it. In addition, it has been acknowledged that exceptionally, more elaborate proceedings such as an oral hearing may be required.

79. In *B.J.S.A. v. Minister for Justice and Equality* [2011] IEHC 381, Cooke J. emphasised that in a separate procedure for subsidiary protection, the process of determining the application must conform to the normal rules of fair procedures and stated:-

"20. … These include, obviously, the principle *audi alteram partem*. Accordingly, if in a given case new facts, information or documentation not previously examined in the asylum process are put before the Minister and are material to the claim for subsidiary protection, that principle would require the Minister to afford an applicant an opportunity of comment or rebuttal if the refusal of the application was to be based, for example, upon a finding that the information was untrue or the documents were forged. That, however, is a matter of basic fairness in administrative procedures where individual rights are potentially affected. …"

80. The court has already quoted Cooke J.'s observations at para. 14 of *B.J.S.A.* that there is no obligation on the Minister to reconsider the same facts or events or to decide whether they should be considered plausible or credible in the light of explanations given in the application for subsidiary protection at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers. The learned judge considered that to require the Minister to do so would effectively convert an application for subsidiary protection into a form of second appeal against the refusal of a declaration of refugee status.

81. Clark J. in *M.A.H. (Bangladesh) v. Minister for Justice and Equality* (unreported High Court Clark J. 26th June, 2012) acknowledged the same limited scope for reconsidering credibility in an application for subsidiary protection as a matter of fair procedure but acknowledged that in an appropriate case this might extend to an oral hearing.

82. Hogan J. in considering the effect of the preliminary ruling in M.M. on these decisions stated as follows:-

"37. If one proceeds from the premise that subsidiary protection is really just another step in the entire process of international protection, then the powerful analysis of Cooke J. contained in the passages just quoted from *Debisi* must be regarded as entirely compelling: see here also the comments made by Cross J. in a similar vein in *H.M. v. Minister for Justice* [2012] IEHC 176, It seems to me nevertheless that this reasoning must, however, be now regarded as having been superseded by the judgment of the Court of Justice in *MM*, precisely because that court commenced the analysis contained in the second part of the judgment from an entirely different perspective, namely, that in a bi-furcated system such as ours, subsidiary protection must be evaluated separately and distinctly from the determination on the asylum application.

38. If that is so, then the considerations mentioned by Cooke J. - such as the need to avoid potentially inconsistent determinations or the understanding that all major credibility findings will made in the oral procedure attending the asylum claim (excepting perhaps entirely new evidence advanced during the subsidiary protection stage) - can no longer prevail.

39. Much of the analysis contained in the judgment of the Court of Justice in *M.M*. had, in any event, been anticipated by the very important decision of Mac Eochaidh J. in *Barua v. Minister for Justice* [2012] IEHC 456.,In that case the applicant was a Bangladeshi national who contended that he had ran foul of certain Islamic activists by reason of his involvement in a local organisation designed to advance the healthcare needs of women and children and had been falsely accused of wrongdoing to the local police. His application for asylum was dismissed on credibility grounds by the Refugee Appeals Tribunal, although in circumstances which prompted Mac Eochaidh J. to comment that "the matters in respect of which findings of lack of credibility were made" seemed to him to have been "marginal".

40. The applicant had, however, submitted certain documentary material by way of corroboration of his case. These documents included certification in basic health care, list of committee members of the organisation in question and a charge sheet and police report in relation to the false allegations. It was put to the applicant at the tribunal hearing that fraudulent documents of this nature were freely available in Bangladesh, but he maintained that these documents were obtained directly from the police by his father. While the tribunal referred to this fact in its decision, Mac Eochaidh J. commented that "no comment or finding was made thereon" and he noted, that it had never been suggested that a complaint had been made against the applicant "in respect of false or fraudulently obtained documents".

41. The applicant then subsequently applied for subsidiary protection, but this application was rejected. The applicant's principal complaint - which Mac Eochaidh J. upheld - was that the decision maker had not given any reasons for rejecting the corroborating documentation as a basis for supporting the applicant's claim. But just as importantly, Mac Eochaidh J. rejected the argument that some form of quasi estoppel operated as against the applicant to debar him from relying on certain arguments in the subsidiary protection process when he had not challenged the decision of the tribunal. Noting

that the applicant had been told that the subsidiary protection process was not an appeal against the asylum rejection, Mac Eochaidh J. observed that in those circumstances it would be unfair to hold findings made by the tribunal in the asylum process against the applicant in the subsidiary protection process without at least giving him an opportunity to reopen these issues.

42. It is precisely these procedural issues which the Court of Justice must have had in mind when it made the comments which it did, especially at para. 92 of the judgment."

83. Hogan J. subsequently held that the Minister failed to afford the applicant an effective hearing of the subsidiary protection application. He stated:-

"46. In these circumstances, in the light of the guidance given by the European Court of Justice on the reference, I must hold that the Minister failed to afford the applicant an effective hearing at subsidiary protection stage, *precisely* because he relied *completely* on the adverse credibility findings which had been made by the Tribunal in respect of the contention that Mr. M. would come to harm if he were returned to Rwanda by reason of his involvement in the office of military prosecutor and because he made no independent and separate adjudication on these claims.

47. In order for the hearing before the Minister to be effective in the sense understood by the European Court of Justice in such circumstances, such a hearing would, at a minimum, involve a procedure whereby (i) the applicant was invited to comment on any adverse credibility findings made by the Refugee Appeals Tribunal; (ii) the applicant was given a completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection and (iii) involve a completely fresh assessment of the applicant's credibility in circumstances where the mere fact that the tribunal had ruled adversely to this question would not in itself suffice and would not even be directly relevant to this fresh credibility assessment.

48. It is unnecessary at this juncture to consider the question of whether a separate oral hearing would ever generally be required at subsidiary protection stage. It probably suffices to say that there might well be many circumstances where such a hearing would be required if a credibility finding adverse to the applicant was to be made which was separate and distinct from that made during the asylum process: cf. here by analogy my own judgment in *Lyons v. Financial Services Ombudsman* [2011] IEHC 454, and the judgment of Cooke J. in *Debisi* albeit that these comments were made only in the context of new information - not previously available in the asylum process - which was made available to the Minister in the course of the subsidiary protection process."

Hogan J. acknowledged that his decision was likely to have far reaching consequences for the practical administration of the subsidiary protection scheme as was operated in the State to date. He understood that it would add new levels of complication, delay and cost to the bifurcated system. The decision was appealed to the Supreme Court.

84. In the course of that appeal in *M. v. Minister for Justice and Equality* (Case C-560/14) (9th February 2017) the CJEU considered a further reference on the issues raised in its previous decision by the Supreme Court. The following question was referred:-

"Does the "right to be heard" in European Union law require that an applicant for subsidiary protection, made pursuant to Council Directive 2004/83/EC, be accorded an oral hearing of that application, including the right to call or cross-examine witnesses, when the application is made in circumstances where the Member State concerned operates two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection, respectively?"

85. The court ruled as follows:-

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

An interview must nonetheless be arranged where specific circumstances, relating to the elements available to the competent authority or to the personal or general circumstances in which the application for subsidiary protection has been made, render it necessary in order to examine that application with full knowledge of the facts, a matter which is for the referring court to establish."

86. The court stated that it did not follow from its previous judgment that an interview must necessarily be arranged under the procedure relating to the grant of subsidiary protection. It noted that the court had previously stated merely that it could not accept the view put forward by Ireland that the fact that the applicant has already been heard in the course of the examination of an asylum application made it unnecessary to arrange a hearing when a subsequent application for subsidiary protection was being examined. There was an obligation to ensure that the right of the applicant for subsidiary protection to be heard was observed even if he has already been heard in the course of an examination of his asylum application. It did not impose an obligation that an interview relating to the application for subsidiary protection must be arranged in all circumstances.

87. The court discussed the nature of the right to be heard guaranteed to an applicant for subsidiary protection as follows:-

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

32 Moreover, the right to be heard must allow that authority to investigate the matter in such a way that it adopts a decision in full knowledge of the facts, while taking account of all relevant factors, and to state reasons for that decision adequately, so that, where appropriate, the applicant can exercise his right of appeal (see, to that effect, judgments of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraph 49, and of 11 December 2014, *Boudjlida*, C-249/13,

EU:C:2014:2431, paragraph 59).

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

34 It follows that the detailed rules under which applicants for subsidiary protection are to be able to exercise their right to be heard prior to the adoption of a final decision on their application must be assessed in the light of the provisions of Directive 2004/83, which are intended, inter alia, to lay down minimum standards relating to the conditions which third country nationals must satisfy in order to be entitled to subsidiary protection (see, by analogy, judgments of 5 November 2014, Mukarubega, C-166/13, EU:C:2014:2336, paragraph 55, and of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 45).

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

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

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

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

88. The court was satisfied that the elements described in para. 36 quoted above including the applicant's general credibility may effectively be canvassed by means of written statements by the applicant accompanied where appropriate by documentary evidence. A procedural mechanism of that kind should be sufficiently flexible to allow an applicant to express his views, to comment in detail on the elements to be taken into account by the competent authority and to set out as he thinks appropriate, information or assessments different from those already submitted when his asylum application was examined. The court noted that the application for subsidiary protection took place following the asylum procedure assessment during which the applicant in *M.M*. had an interview relating to his asylum application. In the present cases each of the applicants was provided with an oral hearing before the Refugee Appeals Tribunal having gone through the interview process with ORAC. The court was satisfied that information gathered at *M.M.*'s interview could also prove useful for assessing the merits of his application for subsidiary protection and his individual position and circumstances. It was satisfied that the information and material gathered at such an interview contributed to the competent authority's ability to determine the application with full knowledge of the facts. The court also pointed out that the right of an applicant for subsidiary protection to comment in writing on the grounds that may substantiate his claim gives him an opportunity to set out his views on the assessment of information or material made in the making of a decision on his asylum application. The right to be heard did not make it necessary for an applicant for subsidiary protection to be afforded a fresh interview in order to add new material to that already set out in writing. It was unnecessary to afford an applicant a fresh interview absent "specific circumstances [that] make it necessary for an interview to be arranged in order that the right of the applicant for subsidiary protection to be heard is effectively observed".

89. The court then considered what such "specific circumstances" might be and noted that the referring court has the task of establishing whether they exist. The court stated that the Member State must actively cooperate with the applicant so that all the elements enabling his application to be assessed may be assembled. It added:-

"49 Therefore, an interview must be arranged if the competent authority is not objectively in a position — on the basis of the elements available to it following the written procedure and the interview with the applicant conducted when his asylum application was examined — to determine with full knowledge of the facts whether substantial grounds have been shown for believing that, if returned to his country of origin, he would face a real risk of suffering serious harm, and whether he is unable, or, owing to such risk, unwilling, to avail himself of the protection of that country.

50 In such a situation, an interview could in fact allow the competent authority to question the applicant regarding the elements which are lacking for the purpose of taking a decision on his application and, as the case may be, of establishing whether the conditions laid down in Article 4(5) of Directive 2004/83 are met.

51 An interview must also be arranged if it is apparent — in the light of the personal or general circumstances in which the application for subsidiary protection has been made, in particular any specific vulnerability of the applicant, due for example to his age, his state of health or the fact that he has been subjected to serious forms of violence — that one is necessary in order to allow him to comment in full and coherently on the elements capable of substantiating that application."

90. If such an interview is required in order to vindicate the applicant's right to be heard, the further question arose as to whether the applicant must have the right to call and cross-examine witnesses at that interview. The court determined that he did not. It added:-

"54 In that regard, it should be pointed out, first, that such a right goes beyond the requirements which ordinarily arise from the right to be heard in administrative procedures (see, to that effect, judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C 204/00 P, C 205/00 P, C 211/00 P, C 213/00 P, C 217/00 P and C 219/00 P, EU:C:2004:6,

paragraph 200) and, secondly, that the rules applicable to the examination of applications for subsidiary protection, in particular those laid down in Article 4 of Directive 2004/83, do not confer particular importance on testimony in order to assess the facts and the relevant circumstances.

55 It follows that the right to be heard does not imply that an applicant for subsidiary protection has the right to call or cross-examine witnesses at any interview in the course of examination of his application."

91. Each of the subsidiary protection decisions in issue in these proceedings relies heavily upon the determination made in each case by the Refugee Appeals Tribunal on the credibility of each applicant. In the case of M.L. the determination of the application contains extensive quotations of the findings of the Tribunal in respect of the applicant's credibility. The Tribunal is quoted as expressing its conclusions having heard the applicant give evidence and having seen him present his evidence at hearing. Having quoted extensively from the finding of the Tribunal the conclusion was reached due to the doubts surrounding the applicant's credibility that he did not warrant "the benefit of the doubt". A similar approach was adopted in the case of J.C.B. It was again concluded that because of doubts surrounding his credibility he did not warrant the benefit of the doubt following extensive quotation and reliance upon adverse findings of credibility against him by the Refugee Appeals Tribunal. V.J.'s credibility was addressed in the same way. There is no evidence to suggest that the applicants were invited to comment on any adverse credibility findings made against them by the Refugee Appeals Tribunal or given a fresh opportunity to revisit any or all matters bearing on their claim for subsidiary protection involving a fresh assessment of credibility.

92. The court is satisfied that the respondents have failed to afford the applicants a fair opportunity to address issues of credibility in the subsidiary protection application. The decision makers in each of these cases have failed to rely on any material outside the adverse credibility findings made with the Tribunal concerning the assertions of fact made by them in respect of their claims. I am satisfied on the basis of the judgment in *M.M. v. Minister for Justice* (Hogan J.) that it was essential that each of the applicants be given an opportunity to address the adverse credibility findings quoted directly in the subsidiary protection decisions from the Refugee Appeals Tribunal decisions and a fresh opportunity to revisit the matters bearing on their claims for subsidiary protection having regard to the requirement that there be a separate and independent adjudication on each of these claims.

93. I do not consider that it is necessary having regard to the decision in *M.M.* following the Supreme Court reference that an oral hearing must in all cases be conducted permitting the calling of witnesses or cross-examination of witnesses by applicants or their legal representatives. It may be that circumstances will arise in which the respondent should consider conducting such a hearing such as those outlined by Cooke J in *N.D.* The applicants have not sought to advance any new evidence. However, the court is satisfied that the applicants should have been invited to comment upon the adverse findings made by the Refugee Appeals Tribunal. If such findings were to be relied upon to the extent evident in these decisions consideration should have been given as to whether this gave rise to "specific circumstances" that would render such an interview or hearing with the applicants necessary in order to ensure that their rights to be heard were effectively observed.

94. The simple adoption of findings of fact by the Refugee Appeals Tribunal in applications for subsidiary protection in respect of the credibility of each of the applicants in the court's view fell short of the fair procedures necessary in order to vindicate the right to be heard of each applicant. Therefore, for the reasons set out above the respective decisions in each case will be quashed. The court is satisfied that this should apply in respect of all three applicants. The applicants M.L. and J.C.B. in ground 2 challenged the determination of the credibility findings on the basis of the RAT decision on that issue and leave was granted on that ground and the additional ground. V.J. was not granted leave on such a ground. The additional ground applicable to all three is related to the question of whether an oral hearing was necessary. Nevertheless, the court is satisfied that the findings of the court require that the decision-maker should consider whether an interview and in some cases an oral hearing ought to be afforded to an applicant when the materials include an adverse finding on credibility which is central to the decision to be made and contested by the applicant. The court is satisfied that the additional ground is sufficient to embrace that finding.

Lack of Independence and Professionalism of Decision Makers – Grounds 5 and 6

95. Grounds 5 and 6 in respect of the first and second applicants focus on the absence of regulation of the competence, knowledge and training of the civil servants assigned to assess the eligibility of applications for subsidiary protection and the suggested failure to ensure that the decision maker is independent of the Minister for Justice and Equality.

96. It is alleged that the decision-makers lacked independence because they were simultaneously looking at questions of deportation and subsidiary protection. I am not satisfied that this was so. Furthermore, I am not satisfied that the evidence establishes that the consideration of the application for subsidiary protection by the first respondent and his officials or the involvement of the same officials in making recommendations in both would lead inevitably to bias. The decisions concern significantly different issues determined at clearly defined and different stages which render them completely separate.

97. It is also submitted that in contrast to the arrangements for subsidiary protection, the RAT is comprised of persons who must be practising barristers or solicitors of at least five years standing. This ensures an applicant for asylum is entitled to a determination by an independent lawyer. There is no appeal procedure and no comparable level of professional decision making in the subsidiary protection process because of the decision made by Ireland to have a separate procedure for such applications. It is submitted that a procedure equivalent to Article 8(2)(a) of the Procedures Directive should be provided in respect of subsidiary protection applications whereby such applications are examined and decisions made "individually, objectively and impartially". Furthermore, Article 8(2)(c) provides that all member states should ensure that the personnel examining applications and taking decisions have the knowledge in respect of relevant standards applicable in the field of asylum and refugee law. The applicants claim that it is established on the evidence that the caseworkers are not lawyers and have no legal training or expertise. There are no guidelines or published criteria to prove consistency between decision makers. Each caseworker researches country of origin information from the various sources referred to by Ms. Hynes in her affidavit. Each is permitted to arrive at their own conclusions in respect of whether or not the conditions in a particular country place an applicant at risk of serious harm. It is submitted that analysing country of origin information involves examining whether or not state protection in all its forms might be available to the applicant and requires a level of expertise which is not evident in these officials. Reliance is also placed on Article 36 of the qualifications Directive which provides that member states shall ensure that authorities and other organisations implementing the Directive have received the necessary training.

98. In all applications for subsidiary protection within the European Union whether in a unitary or bifurcated process, the asylum case is first considered. It is only when the application for refugee status is refused that the eligibility for subsidiary protection will be considered. The Qualification Directive undoubtedly envisages that the applicant's credibility will be assessed in respect of the asylum application by the decision maker. The unitary process under Article 3.3 contemplates a procedure "in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other crimes of international protection". No issue arises in the unitary process concerning the involvement of the same personnel in adjudicating on issues of asylum and subsidiary protection provided the appropriate sequence in the decision making process is followed.

99. The court is not satisfied that a decision maker in respect of subsidiary protection lacks independence because they are at the same time vested with the decision in respect of deportation. The decision to deport is the final decision made in the immigration process. There is no requirement on a member state to establish a decision making process which is independent of the first respondent. Different procedures apply amongst the European Union Member States. In some states provision is made for the Minister for Justice or his/her equivalent to act through their officials and I do not consider that of itself to be legally objectionable under domestic or European Union law.

100. In Ireland it is clear that if there is a real apprehension of bias there is a remedy by way of judicial review to a judicial body as guaranteed by Article 39 of Directive 2005/85. At the conclusion of those proceedings the court has power to refer the matter back for a new decision before a different official of the respondent in the event of the quashing of the subsidiary protection decision by reason of error of law. This remedy is also available of course, in asylum cases. I am not satisfied that the applicants have established a lack of independence on the part of the decision makers generally or by reference to the facts of the particular cases.

101. The applicants have also raised the issue of the competence knowledge and training of the decision makers involved in subsidiary protection. This matter was addressed in the affidavit of Ms. Hynes who gave evidence of the training and experience of the officials assigned as decision makers. In addition, in the cases under consideration the work of the lower ranking case-worker is reviewed, usually twice by officials who are their superiors. I am satisfied from the evidence adduced and the content of the considerations and examinations of file exhibited that the personnel assigned demonstrate in their decision making knowledge in respect of the standards applicable in the field of asylum refugee law and acted individually, objectively and impartially. There is no evidence of interference by the first named respondent in their decision making or independence. While the personnel employed in respect of asylum cases on appeal are legally trained, it does not follow inexorably that civil servants having knowledge and experience in this area and access to the relevant materials ought not to be assigned the duty of making decisions on subsidiary protection. Though the assertion is made that the competence knowledge and training of the officials is not regulated, there is clearly a process for training and updating their knowledge. There is no cogent evidence of any nature to suggest that the officials generally or individually in respect of these cases lacked competence knowledge or training to justify a conclusion by this court that there has been a fundamental default of fair procedures in the decisions in respect of subsidiary protection. I am not satisfied that it is necessary that a non civil servant be assigned to such decision making or that their independence (much less their integrity) may be called into question simply because they are so employed.

102. I am not satisfied that there is any substance in these grounds.

103. There is no doubt that procedures may be reviewed and usefully improved in any organisation and the court notes that subsidiary protection procedures have undergone considerable change in the recent past. However, that does not of itself provide evidence that the procedures hitherto employed were legally infirm to the extent set out in the grounds advanced in support of these applications.

Conclusion

104. For the reasons set out above I am satisfied to grant orders of *certiorari* quashing the decisions made in each case refusing subsidiary protection status on ground 2 in respect of M.L. and J.C.B. and the additional ground in respect of all three. The others grounds advanced have not been established.