THE HIGH COURT

JUDICIAL REVIEW

Between:/

Record No. 2011 / 853 J.R.

J. C. M. [DRC]

AND

Record No. 2011 / 856 J.R

M. L. [DRC]

APPLICANTS

-AND-

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

RESPONDENTS

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 12th day of October 2012.

1. The applicants, who both come from Kinshasa in the Democratic Republic of the Congo (DRC), seek leave to apply for orders of certiorari by way of judicial review, quashing the decisions of the Minister for Justice and Equality ("the Minister") refusing to grant them subsidiary protection and making deportation orders against each of them.

2. While these two cases are otherwise unconnected, one judgment will be given in these leave applications as the applicants submitted a set of identical legal submissions in each case entitled "Procedural Position" and are represented by the same legal teams. Indeed the same submissions have been relied upon by the same solicitors in a large number of other applications pending before this Court. The leave applications were heard before this Court on the 14th and 28th of February and on the 7th of March 2012. *Ms. Sunniva McDonagh S.C.* (with her *Paul O'Shea B.L.)* appeared for the applicants in both matters. *Mr. David Conlan Smith B.L.* appeared for the respondents in both matters.

Mr. M - Facts

3. Mr. M says that he arrived in the State on 6th February 2009 aged 20 and claimed asylum based on his assertion that he was a member of the *Save the Congo / Armée de Victoire* and had for several years been the driver for the wife of Pastor Ferdinand Kutino, the leader of the movement. Mr. M claimed that he was arrested at a demonstration organised to protest at the detention of Pastor Kutino and was held for 11 months without charge. He said that during that time he was beaten, raped and threatened by DRC State forces but he was ultimately released by a Colonel on the basis that he agreed to administer supplied poison to the Pastor's wife. He was offered $10,000 for this task; $3,000 as a down payment with the rest to follow on completion. Upon his release, he went to the home of the Pastor's wife but found that he was unable for the task and was advised by a friend to flee the DRC. Using the partial payment, he purchased a passage out of the DRC and thus preserved his life which was under threat from the Colonel who had said he would kill him if he did not carry out his mission.

4. The Refugee Applications Commissioner found that Mr. M's application was manifestly ill-founded and he was therefore confined to a documents-based appeal before the Refugee Appeals Tribunal. The Commissioner relied on several negative credibility findings including Mr. M's slim knowledge of major events relating to Pastor Kutino, and also on information from the UK Border Agency indicated that his fingerprints were on a visa application to visit the UK in 2007 with different personal details. On 5th October 2010 the Refugee Appeals Tribunal affirmed the Commissioner's negative recommendation and Mr. M was advised of that decision. He did not challenge the Tribunal decision by way of judicial review. Thereafter, by a standard form letter, the Minister informed Mr. M that his claim for refugee status had been refused. The letter continued:

> "*While your application was being decided, you were allowed to stay in the state temporarily. That entitlement has now expired. The Minister now proposes to make a deportation order for you, under Section 3 of the Immigration Act, 1999, as amended." (Emphasis in original).*

5. The letter went on to outline Mr. M's options. The first option was to leave the State before the Minister decided on a deportation order; the second was to consent to the deportation order; while the third option (which is relevant to this challenge) was to apply for subsidiary protection and / or make representations as to why he ought to be permitted to remain temporarily in the State. The wording of that third option is important. The relevant portion of the "three options" letter reads in full:-

> "*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 choose 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. If the Minister decides that you may 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).*

6. On 7th December 2010 the Refugee Legal Service (RLS) submitted an application for subsidiary protection on behalf of Mr. M together with an application for leave to remain on humanitarian grounds, in accordance with the procedure set out in the "three options" letter. The factual basis for the claim for subsidiary protection mirrored the asylum claim; it was submitted that if returned to the DRC Mr. M would be at risk of harm, imprisonment and death. Additional submissions on the poor human rights record of the DRC government were made and the RLS also quoted from various sources, much of which related to parts of the country irrelevant to Kinshasa where Mr M says he lived.

7. On 28th June 2011 the Minister's officials determined that Mr. M was not eligible for subsidiary protection. That decision was notified to him on 25th July 2011. Meanwhile on 27th June 2011 the leave to remain application pursuant to s. 3 of the Immigration Act 1999 was considered and on 5th July 2011 it was determined that there were no grounds for humanitarian leave to remain and that a deportation order should be made. On 5th August 2011 a deportation order for Mr. M was signed. On about 18th August 2011, he was informed of the deportation order and of his obligation to leave the State by 3rd September 2011 and he was required to present to the Garda National Immigration Bureau (GNIB) to make arrangements for his removal from the State. The within proceedings which challenge both the subsidiary protection decision and the leave to remain decision were filed on 13th September 2011.

Mr. L - Facts

8. Mr. L arrived in the State on 24th September 2008 and claimed asylum on the following basis. Both of his parents were serving army officers. He trained as a mechanic but worked for four years as a porter at a Health Centre which was owned by an uncle. On 21st August 2008 a Colonel's wife who was a patient at the clinic died. The Colonel immediately accused the staff of killing her and arrested the applicant and his sister and four other members of staff. Because the four others shared Swahili ethnicity with the Colonel they were released while the applicant and his sister who were from Bas Congo continued to be detained. The applicant and his sister were severely maltreated and the applicant was handcuffed in his cell while he was forced to watch his sister being raped. They were both taken to a military court for trial but there they met one of their father's friends who was a high ranking Colonel and he agreed to help them to escape. The applicant and his sister left the DRC on 23rd September 2008 and having travelled through France by plane they arrived in Ireland the following day.

9. Both the Refugee Applications Commissioner and the Refugee Appeals Tribunal rejected Mr. L's claim on credibility grounds. Those decisions were not challenged. On 10th January 2011 Mr. L was advised that he had been refused refugee status and he was served with the same "three options" letter as Mr. M, in the terms set out above. On 21st January 2011 Mr. L applied through the RLS for subsidiary protection and for leave to remain. He repeated the facts on which his asylum claim were based without variation and on 1st March 2011 he made further representations and furnished the Minister with country of origin information (COI) reports on the DRC.

10. On 20th July 2011 the Minister's officials determined that Mr. L was not eligible for subsidiary protection and the decision was notified to him on 25th July 2011. On 10th August 2011 his application for leave to remain was considered and on the same day it was determined that a deportation order should be made. The deportation order was signed on 11th August 2011 and notified to the applicant on 18th August 2011. As with Mr. M, the within proceedings were filed on 13th September 2011.

Grounds on which Leave is Sought

11. The applicants seek leave on a large number of grounds which essentially fall under the following five headings:-

> (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 life-long consequences of such an order; and

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

THE COURT'S DECISION

12. The applicants each require a brief extension of time to bring their leave applications. The delay is short and some explanation has been provided in each case, which is not in itself *prima facie* a good and sufficient reason for the extension of the time but the Court is willing to assess the grounds advanced by the applicants to determine whether, in the interests of justice, an extension of time is warranted.

(i) Lack of effective remedy

13. The argument that the State has failed to provide the applicants with an effective remedy to challenge negative subsidiary protection and deportation decisions in accordance with the Constitution, Article 13 of the European Convention of Human Rights ("ECHR") and Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter") has been made in many cases over the last year and in modified form in previous years. The argument as it has generally been formulated is that common law rules of judicial review restrain a court from considering new material and therefore judicial review is ineffective as a remedy. Further, as judicial review does not trigger an automatic suspensive effect of a deportation order, it cannot be an effective remedy. The lack of an appeal mechanism for decisions refusing subsidiary protection and for orders of deportation is also said to breach the principles of equivalence and /or effectiveness. Each of these arguments is considered below.

14. In addition to these arguments, which have been raised and considered in a large number of cases, there was in this case an additional element to the effective remedy arguments raised. At the outset, the applicants sought to argue that the decision of Hogan J. in *Efe v. Minister for Justice, Equality and Law Reform* (No.2) [2011] IEHC 214 meant that if the Court refused to consider post-dated material when judicially reviewing subsidiary protection decisions, the remedy of judicial review is ineffective. That argument was effectively abandoned, however, as during the course of the leave applications in the within cases, the Supreme Court delivered its judgment in *Donegan v. Dublin City Council, Ireland and the Attorney General; Gallagher v. the Attorney General* [2012] IESC 18. At the resumed hearing of the leave applications in March, the applicants contended that arising from the judgment of the Supreme Court, the remedy of judicial review can no longer be considered flexible enough to vindicate fundamental rights. In other words, they argued that *Efe* and the decisions on which Hogan J. relied therein were overtaken by *Donegan and Gallagher*.

The Impact of Donegan and Gallagher

15. This Court does not accept that the decision of Hogan J. in *Efe v. Minister for Justice, Equality and Law Reform* (No.2) [2011] IEHC 214 had the effect which the applicants argue for, and it also rejects the applicants' interpretation of the Supreme Court decision in *Donegan*. The scholarly analysis conducted by Hogan J. in *Efe* as to the parameters of the powerful remedy of judicial review did not, as suggested by the applicants, determine that the Court must either take account of post-decision materials when considering the reasonableness or proportionality of a subsidiary protection decision, or accept that judicial review is an effective remedy. Judicial review has been found in a considerable body of cases to constitute an effective remedy within the meaning of EU law and for the purposes of the ECHR. However, this does not mean, as alleged by the applicants, that judicial review is so flexible as to permit this Court to consider new evidence that was not previously before the Minister. The Court is not entitled to move beyond the accepted norms and principles of judicial review to become an appellate body as opposed to the traditional review body it has always embodied. No interpretation of *Efe* could lead to this conclusion. Equally, *Donegan and Gallagher* went no further than to reiterate the traditional principles on which judicial review functions. The Court has reached its considered opinion in this regard for three reasons. Firstly, the application of *Donegan and Gallagher* is confined to its own facts and circumstances, namely s. 62 of the Housing Act 1966. This is clearly borne out by the finding of McKechnie J. at paragraph 128 of the judgment that:

> "*When considering the adequacy of judicial review as a sufficient safeguard in this context it must therefore be done with reference to the s.62 application; the question is whether judicial review will provide a sufficient safeguard against an interference, by virtue of the provisions of that section.*"

16. Secondly, even if *Donegan and Gallagher* does have a wider application, it does not serve to impact on the *status quo*. Subsidiary protection applications and s. 62 applications are so demonstrably different that they highlight why judicial review can be considered effective in one instance but not in the other. Whilst a decision refusing subsidiary protection is taken at the end of an involved process which affords several opportunities to challenge findings of fact or law, the District Court decision in s. 62 cases which was considered by the Supreme Court was confined to the proofs required by s. 62(1) of the Housing Act 1966. These were general in nature and did not comment on the specifics of the situation.[1] Unlike the Minister in subsidiary protection cases, the District Court in s. 62 cases had no discretion to explore the underlying merits and no jurisdiction to address the procedures employed by the City Council in arriving at its decision to terminate a tenancy. In effect it was a "rubber stamping" exercise and once the proofs were established the District Court was required to grant the order. Any defence afforded to a tenant was restricted to the formal proofs which offered little or nothing to judicially review. Section 62 provided no procedural safeguards to address any conflict of fact at the core of the termination decision, for example in the *Donegan* case as to whether one of the applicant's sons was a drug addict or a dealer. Subsidiary protection applications are radically different.

17. Thirdly, McKechnie J.'s conclusion at paragraph 131 confirms that the traditional interpretation of judicial review remains unaltered:-

> "*Thus although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of facts*"

18. It is now very well established that judicial review is an effective remedy and, taken in the context of the aggregate remedies available, is sufficiently flexible to vindicate fundamental rights whether those rights derive from EU law, from the ECHR, from decided cases, from statute or from the Constitution. *Donegan and Gallagher* does not alter that situation; it was a decision which was expressly confined to its own facts.

Inability to consider post-dated materials

19. One of the primary aspects of the applicants' complaints in relation to the effectiveness of judicial review is that the Court cannot consider relevant materials which were not before the decision-maker at the relevant time. This is a principle which has long been in

place. It is not correct to state that the European Court of Human Rights has found judicial review as it operates under these constraints to be an ineffective remedy. That Court has consistently taken the view that judicial review must be considered in the context of all of the remedies available to an aggrieved person (see e.g. *Muminov v. Russia* (2011) 52 EHRR 23). This is also reflected in recital (27) to Directive 2005/85/EC ("the Procedures Directive"). Therefore, in considering the effectiveness of judicial review as a remedy for violations of fundamental rights in circumstances of changed relevant facts since the decision, the totality of available remedies must be considered. The applicants in these cases had two opportunities to challenge the findings of fact made by ORAC and the RAT but they did not do so. Instead, they repeated the same claim to the Minister in their subsidiary protection applications and asserted the same facts in these leave applications as if no negative findings had been made by the earlier decision-makers.

20. The respondents asked the Court to consider, as part of the aggregate of remedies available, that there is nothing in the Protection Regulations which would prevent the applicants from seeking revocation of their negative decisions on subsidiary protection. This could perhaps be done, the respondents argued, if materially relevant evidence to substantiate a real risk of serious harm to a person upon return to his country of origin becomes available after the decision has been made. The respondents argue that if an applicant was successful in having the decision revoked, he could then to make a fresh application. However, as the Court is unaware of any case where such procedures have in fact been invoked, and as there is no statutory entitlement to apply for revocation of a negative subsidiary protection decision, the Court cannot speculate as to the approach which the Minister might take to any such application. The applicants could, however, have sought a declaration from this Court that they were entitled to make a fresh application for subsidiary protection. They have not sought such a declaration.

21. Assuming, for the purposes of argument, that the applicants were in possession of relevant information which did not come to light until after they had been notified of the decisions challenged herein, the Court is satisfied that alternative remedies other than a hypothetical application for revocation of the subsidiary protection decisions would be available to the applicants. For instance they could seek revocation of the deportation orders under s. 3(11) of the Immigration Act 1999 or re-admission to the asylum process pursuant to s. 17(7) and (7A) of the Refugee Act 1996. S.I. No. 51 of 2011 provides that re-admission to the asylum system may be granted "*where new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee*". In the event of a negative decision on any such application they could seek injunctions preventing their deportation pending the determination of any fresh proceedings.

22. As it is clear that every unsuccessful protection applicant has the opportunity to apply to this Court for an order of certiorari quashing the negative decisions of the Minister and further to avail of other remedies if it is sought to introduce relevant new information, the Court is satisfied that the aggregate of remedies available satisfies the requirements outlined in the jurisprudence of the European Court of Human Rights and accords with the decision of the Court of Justice of the EU in *Hristo Gaydarov* (Case C-430/10, judgment of 15th November 2011) to the effect that an effective remedy must "*permit a review of the legality of the decision at issue as regards matters of both fact and law in the light of European Union law*".

Automatic Suspensive Effect

23. The applicants further argued that for judicial review to be an effective remedy, its engagement ought to automatically suspend or stay an order where there is a real risk of serious harm if the person is returned to his or her county of origin pursuant to the order; in other words there should be no need to apply for an injunction to restrain the execution of a deportation order. The jurisprudence of the European Court of Human Rights does not support the applicants' contention; that Court has set the bar for the requirement of automatic suspensive effect at a high level. There is no doubt that where an applicant can establish substantial grounds for believing that there is a real risk of treatment contrary to Article 3 upon his deportation, automatic suspensive effect is required. In other words, a remedy will be effective only if it prevents the execution of measures which are contrary to the Convention and whose effects are potentially irreversible (see e.g. *Conka v. Belgium* (2002) 34 EHRR 54, at § 79; *M.S.S. v. Belgium* (2011) 53 EHRR 2, at § 293). However, automatic suspensive effect is not and cannot be required in each and every case where an applicant makes a bare allegation that his deportation will give rise to a breach Article 3. Before Article 13 can be applicable, a complaint under a substantive provision of the Convention must be arguable (see e.g. *Muminov v. Russia* (2011) 52 EHRR 23, at § 99). It follows that a bare assertion that an applicant would be subjected to serious harm does not entitle him or her to an automatic suspension of any potential deportation.

24. The Court is satisfied that notwithstanding three days of lengthy argument the applicants have failed to establish any arguable complaint under any provision of the Convention. Their assertions were based on hypothetical generalities and they have not established substantial grounds for the contention that their return to the DRC will give rise to irreversible treatment contrary to Article 3. They have therefore been unable to establish that their challenges require automatic suspensive effect. Cooke J. in *A.P.A. (a minor) v. The Minister* [2010] IEHC 297 effectively found that the system by which deportation decisions are judicially reviewed in this State incorporates a degree of automatic suspensive effect in that the Minister cannot execute a deportation order within the 14 days allowed if judicial review proceedings issue. At paragraph 16 of his judgment, Cooke J. set out seven propositions in relation to the approach taken by the Irish courts, the second of which is as follows:

> "*Where an application for judicial review of a deportation order is made within the fourteen day period and alleges that the order is unlawful as a violation of a right or freedom under the Convention, the Minister would act in a manner incompatible with his obligations under the Act of 2003 by deporting the person concerned prior to the return date of the motion for the leave application*."

25. It is clear from the decision of Cooke J. that the deportation is stayed until the return date of the motion for the leave application. On the return date, the applicant will have an opportunity to seek an interlocutory injunction restraining deportation and when exercising its discretion as to whether it should grant a injunction, the Court will determine whether there is a fair issue to be tried by hearing arguments made relating to any breach of an ECHR right which will be breached by a deportation. The Court will invariably restrain a deportation if the applicant can establish substantial grounds that deportation would give rise to a breach of Article 3. The decision in *A.P.A.* is instructive in this regard. It is also helpful to note that Cooke J. held as follows at paragraph 18:

> "*With regard to the exercise of the Court's jurisdiction to grant an injunction in this context, it is important to draw attention again to the emphasis placed in the case law of the Strasbourg Court on the connection between the effectiveness of the remedy and the irreversible character of the violation of the Convention alleged. At paragraph 101 of its judgment in the Mumenov case the court pointed out that*:
>
> > "*…the scope of the State's obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Given the irreversible nature of the harm that might occur if the alleged risk of torture or ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to*

the country of destination, and (ii) the provision of an effective possibility of suspending the enforcement of measures whose effects are potentially irreversible (or "a remedy with automatic suspensive effect" as it is phrased in Gebremedhin v. France, application no. 25638/05 para 66 in fine.)""

An Appeal Mechanism
26. The applicants contended that in order for a remedy to be effective it must entitle them to a full merits based appeal. As subsidiary protection decisions concern serious harm it is not enough that they be reasonable; they must be right. The applicants argued that as the Court is bound by the restrictive application of judicial review it cannot interfere in any decision considered to have been reasonably made even if the Court itself would have come to a different determination based on the same facts.

27. The Court cannot accept these arguments. The reasonableness of a decision has in this jurisdiction included an analysis of proportionality in view of the Courts' inherent duty to vindicate fundamental rights. This was reiterated in *Meadows v. The Minister* [2010] 2 I.R. 701. Article 47 of the Charter of Fundamental Rights of the EU, which guarantees the right to an effective remedy, does not say that this remedy should take the form of an appeal, nor does any secondary law of the EU suggest that an effective remedy equates to an appeal. In the opinion of this Court, the recent decisions of the Court of Justice of the EU in *Gaydarov v. Bulgaria* (Case-430/10, decision of 17th November 2011) and *Diouf v. Luxembourg* (Case-69/10, decision of 28th July 2011) provide no further assistance on this matter. Both the applicants and the respondents sought to rely on paragraph 41 of *Gaydarov* in support of their conflicting contentions. The pivotal paragraph reads:

> "*Lastly, since, according to the referring court's presentation of the then applicable national law and in particular the case-law to the effect that the administrative authority has a discretion in respect of adopting that type of measure and there is no judicial review of the exercise of that discretion, it must be emphasised that the person to whom such a measure is applied must have an effective judicial remedy…... That remedy must permit a review of the legality of the decision at issue as regards matters of both fact and law in the light of European Union law …. In order to ensure that such review by the courts is effective, the interested party must be able to obtain the reasons for the decision taken in relation to him, either by reading the decision itself or by requesting and obtaining notification of those grounds, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information."*

28. The controversial sentence is: "*That remedy must permit a review of the legality of the decision at issue as regards matters of both fact and law in the light of European Union law*". The applicants interpreted this sentence to mean that for judicial review to be effective it must take the form of an appeal. The respondents argued that the emphasis of the sentence should have been placed on the word "legality".

29. There is no doubt that the review of the legality of a decision is the classic function of judicial review and that such High Court review includes addressing the facts, whether agreed or found. Judicial review is as described in Diouf where the Court of Justice of the EU stated at paragraph 61:-

> "*The right to an effective remedy is a fundamental principle of EU law. In order for that right to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons*."

30. Judicial review as exercised by our courts fulfils these requirements and the absence of an appeal does not infer the lack of an effective remedy.

The Principles of Equivalence and / or Effectiveness
31. The applicants' argument that the absence of a right to an appeal in respect of a subsidiary protection decision violates the principles of equivalence and /or effectiveness has been repeatedly rejected: see *inter alia* the decisions of Cooke J. in *B.J.S.A. v. Minister & Others* [2011] IEHC 381 and *S.L. v. The Minister* [2011] IEHC 370; Ryan J. in *N.O. v. The Minister* [2011] IEHC 472 and Hogan J. in P*.I. & Others v The Minister & Ors* [2012] IEHC 7. The Court finds no reason to offer an extended analysis of this well rehearsed issue.

Conclusion on the Effective Remedy argument
32. The applicants have not made out substantial grounds on the effective remedy argument. Arguments relating to the effectiveness of judicial review have come before the Court in a great number of cases over the past several years and this Court is unaware of any case where the arguments have led to the quashing of an asylum or immigration decision. In that respect, this Court would like to echo the words of Hogan J. in *P.M. v Minister* [2011] IEHC 409 where at paragraph 21 he stated:-

> "*It is clear that the modern law of judicial review is sufficiently flexible and accommodating so that every legal right and entitlement - whether deriving from the common law, statute, the Constitution, ECHR or the European Union law itself – can and will be adequately protected*."

33. The applicants have not raised any novel points.

(ii) Failure to co-operate
34. The applicants contend that the Protection Regulations failed to properly transpose and implement Article 4(1) of the Qualification Directive, rendering their subsidiary protection decisions *ultra vires* and in breach of EU law. Hogan J. has referred this point to the Court of Justice of the EU in *MM v. Minister for Justice and Equality* (Case C-277/11). A decision on this issue is awaited. In his opinion of 26th April 2012, Advocate General Bot has advised that there is no difficulty with the particular procedures referred. This Court will adjourn its decision on this aspect of the challenge pending the advice from the Court of Justice.

(iii) Selective consideration of COI
35. The applicants also challenged the validity of both the subsidiary protection decisions and the deportation orders on the grounds that the Minister failed to have proper regard to the representations made; that the decisions were unreasonable and disproportionate; that representations made and the country of origin information (COI) furnished were read selectively against the applicants' interests; that the conclusions reached were irrational; and some of the information considered was out of date.

36. Concentrating on the personal details and claims of these two applicants, it is seen that they are from Kinshasa and they will be returned there if their deportations orders are put into effect. The Minister therefore correctly focussed his attention on the area of the DRC which was relevant to each applicant and not on the situation prevailing in Kivu Province or in Ituri where open conflict continues. While the Court can readily accept that life in Kinshasa does not compare to conditions in the Irish towns where Mr. M and

Mr. L currently reside, country reports nevertheless describe a functioning police force, even if it is under-funded and policemen are open to accepting corrupt payments. Relative to the war zones in eastern and south eastern DRC there is something approaching normal order in Kinshasa. While describing it as a place where the "rule of law" prevails (as the Minister's agents did) may be inappropriately optimistic, the fact remains that these two individual applicants were deemed not to be in need of protection as their stories were not found credible. It was not accepted that they have powerful enemies in the body of the Colonel who was alleged to have given Mr. M the poison to kill Mrs. Kutino or in the case of Mr. L, the Colonel who allegedly imprisoned him because his wife died in the clinic where Mr. L was a porter. While the poor human rights record in the DRC is accepted, 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 face a real risk of serious harm on their return to Kinshasa. That is the fundamental fact behind the individual refusals of subsidiary protection. If the applicants did not agree with the conclusions drawn by the Refugee Appeals Tribunal, then the correct approach was to challenge those orders by judicial review and / or to make submissions to the Minister as to why the credibility findings made by the Commissioner and / or the Tribunal were incorrect. The assessments carried out by the Minister's agents may contain some excessively optimistic assertions but overall, the conclusions reached are neither unreasonable nor irrational in the specific circumstances of these two cases.

(iv) Disproportionality of Deportation Order

37. The applicants made several unconvincing arguments relating to the alleged disproportionate effect of a life time effect of a deportation order. As was the case in *Sivsivadze & Others v. The Minister & Others* [2012] IEHC 244, which was delivered since the leave hearing in the within cases, no argument was made which relates specifically to these two applicants whose only connection with Ireland is their asylum claim. They do not enjoy the same rights as so-called "settled migrants", i.e. long term foreign national residents with family connections or roots in this country. The concept of disproportionality post-*Meadows* requires a comparator or standard. It does not stand alone. There must be some measurement of end and means.

38. The Court further notes that the effects of a deportation order are not necessarily life-long as any person subject to a deportation order can seek revocation of the deportation order even if he has already been returned to his home state and if he is successful, can apply for a visa to re-enter the State. The Court is satisfied that no substantial grounds have been identified in this regard.

(v) Unfairness

39. The applicants made a number of related arguments relating to the lack of fairness of the procedures adopted in this jurisdiction relating to subsidiary protection. They assert that the entire subsidiary protection procedure is essentially unfair because once such application is made and fails, the applicant loses the right to leave the State voluntarily. It was argued that this is the only logical inference to be drawn from the third option offered in the so-called "three options letters", which is reproduced in full above. However as the respondents point out, neither of these applicants ever indicated an intention to leave the State voluntarily nor sought assisted repatriation at any stage. It is difficult to see how this argument could be sustained. Mr. L was notified on 25th July 2011 that his application for subsidiary protection was unsuccessful. He was entitled to voluntarily leave the State at that point as his deportation order was not signed until 11th August 2011. Similarly with Mr. M there was an eight day interval between the refusal of subsidiary protection and the decision to sign a deportation order. There were no impediments to their indicating an intention to leave voluntarily before deportation was considered. This argument has no substance.

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.

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 e.g. *S.L. (Nigeria) v. The Minister & 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 relegated to a grace and favour status. In that letter the Minister states:

> "*While your application was being decided, you were allowed to stay in the state temporarily. That entitlement has now* ***expired****. The Minister now proposes to make a* ***deportation order*** *for you, under Section 3 of the Immigration Act, 1999, as amended*."

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. had delivered a judgment in *V.J. (Moldova) v. The Minister* [2012] IEHC 337 (31st July 2012) granting leave in relation to this very issue.[2]

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 Applications 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 Applications 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 safeguards 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 in to the common minimum standards introduced under the Qualification and Procedures Directives. However, draft legislation which envisages a unitary system has been before the Dáil in one form or another since 1998 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 this Court views the subsidiary protection process supports the view that their 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.

Grounds on which leave will be granted

46. For the reasons as outlined above, leave is refused on the majority of the grounds canvassed in this judgment. However, the Court is prepared to grant leave to pursue arguments relating to the manner in which effect is given to the right to apply for subsidiary. The Court is of the view that the case of *V.J. (Moldova) v. The Minister* [2012] IEHC 337, where leave was granted on more restricted though similar grounds, should travel with this and other cases where similar grounds are raised. The ground on which the Court proposes to grant leave is:-

> "*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*

1. The proofs were (1) that the dwelling was provided by the housing authority; (2) that no tenancy existed in respect of such a dwelling; (3) that notwithstanding a demand for possession, the dwelling remained occupied by the individual to whom the demand was addressed; and (4) that within the demand there was a statement of the housing authority's intention to invoke s. 62 in the event of possession being refused or denied.

2. The ground on which Cooke J. gave leave in V.J. was a follows: "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."