Neutral Citation Number: [2011] IEHC 451

THE HIGH COURT

2010 952 JR

BETWEEN

S. N.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 27th July , 2011

1. This application for judicial review presents a difficult question of statutory interpretation arising from the European Communities (Subsidiary Protection) Regulations 2006 (SI No. 518 of 2006)("the 2006 Regulations"). Leave to apply was granted by this Court (Cooke J.) on one single ground, namely, whether the Minister's decision to refuse to grant the applicant subsidiary protection contravened Article 5(1) and Article 5(2) of the 2006 Regulations:

> "by failing to consider and state a conclusion on the claim made by the applicant in the application for subsidiary protection that she had suffered serious harm and that there were compelling reasons as evidenced by the reports on her medical condition which made her eligible for protection on the basis of previous serious harm alone."

2. The application arises in this way. The applicant, Ms. SN., is a 52 year old Ugandan national who contends that she was kidnapped by a rebel group, the Lord's Resistance Army ("the LRA"), in the region of Goulo. During this period she claims was held as a captive and forced to cook and collect firewood for the rebels. She was not, however, physically ill-treated during this period.

3. After about a month later the rebels' camp was attacked by government forces and the applicant was taken by those forces. The applicant was then detained for the best part of ten months. She was says that she was kept in degrading conditions, with little food and sanitation. She claims that she was regularly beaten, raped and burned with melted plastic on many occasions. She further contends that this was done by members who sought to interrogate her with regard to knowledge of the rebels, as they suspected her of complicity with those groups. She managed to escape in November, 2004 and ultimately arrived in Ireland in a traumatized state where she applied for asylum. Yet the account is not without its discrepancies. The applicant is not, for example, in a position to say how she escaped from custody or how she came to travel from Uganda to Ireland. She surmises that her escape must have been organized by her son, yet it is unclear how he could have known her precise whereabouts as (on her account) she was held captive by Ugandan troops in a "safe house" in Kampala.

4. Ms. SN was subject to a comprehensive medical examination by two distinguished and experienced physicians at the Centre for the Care of Survivors of Torture. In their Spirasi report of 29th August, 2005 ("the 2005 Spirasi report") they concluded that the hyper-pigmentation and irregular pigmentation was consistent with burn injuries and the pouring of scalding water on her lower abdomen. They also found that her injuries were "consistent" with her contentions that her breasts had been burnt and scarred and, furthermore, that her other parts of her body had multiple scars and lacerations which were consistent with repeated beatings and burns. As if her plight was not bad enough, she has now been diagnosed with HIV which, it would appear, she contracted following the repeated sexual assaults.

5. I should pause here to observe that the use of the term "consistent" is something of a term of art in this context. As I ventured to suggest in a recent judgment on this theme, *K. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 301:-

> "The terminology used in medico-legal reports of this kind dealing with persons who contend that they have been victims of torture is something of a term of art having regard in particular to the internationally accepted guidelines contained at paragraph 187 of the Istanbul Protocol (1999). For my part, however, I would interpret Ms. K.'s medico-legal report as saying that her symptoms are simply consistent with her account, i.e., in line with paragraph 187(b) of the Protocol:-
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> > "the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes."

6. As it happens, another examining physician from the Centre for the Care and Survivor of Torture sent a letter to the respondent in October, 2009 ("the second Spirasi letter") which detailed the applicant's current physical and emotional plight, adding that "forced repatriation at this stage in her recovery would serve only to reinforce the negative impressions that she has developed since her traumas." The letter referred to the 2005 Spirasi report and stated that this report was "highly consistent with that of a woman who suffered the allegations that [Ms. N.] claimed". This seems to have been a slip on the part of the examining physicians, since the 2005 Spirasi report had merely used the term "consistent", rather than "highly consistent".

7. In its decision of 27th May, 2009, the Refugee Appeal Tribunal noted that these medical reports "can only go so far to say that these are consistent with injury in the manner alleged", while observing that the use of this term "does not rule out these injuries having been caused by a potential variety of other causes." Having referred to some discrepancies in the applicant's account, the Tribunal member concluded:

> "At best, this applicant's evidence points to her having suffered some injuries in her country of origin [and that] she has contracted a series of sexually transmitted diseases; however, it is impossible to say how any of these injuries or illness were caused.
>
> The SPIRASI report does not go so far as to say that this applicant was tortured. I note above again the reference to

> 'consistent'. Even if I were in a position to conclude that this applicant had suffered past persecution, the country of origin information does not support a claim that this applicant will face persecution for a Convention reason if returned to her country of origin. I simply cannot therefore conclude that this applicant has disclosed a reasonable likelihood of persecution for a Convention reason…."

8. I should interpose to observe here that while the country of origin information suggested that the rogue elements of the Ugandan forces had in the past detained suspected members of the LRA for the purposes of torture and (in the case of females) sexual slavery in such safe houses, the latest such information suggested that in the light of an official amnesty that there was no current risk from the Ugandan authorities to former members of the LRA. The Tribunal also pointed to the fact that the applicant was not even a member of the LRA and added:-

> "The applicant has presented no country of origin information to support a claim that she would be profiled as a rebel, or that she fits the profile of someone who might be considered a rebel supporter. The country of origin information in short does not support the applicant's claim, on a forward looking basis, to fear persecution in Uganda."

The Subsidiary Protection decision

9. In his decision of April, 2010 the Minister concluded that the applicant was not entitled to subsidiary protection. The net question for consideration was succinctly stated thus:-

> "The question to be answered in relation to this particular claim is whether the applicant would face a real risk of torture or inhuman or degrading treatment or punishment or serious or individual risk to her life or person by reason of indiscriminate violence in situations of international or armed conflict, if she was returned to Uganda and whether or not she could avail of State protection from such serious harm."

10. The Minister then conducted a detailed factual analysis of the case, the current political, economic and security climate in Uganda. It acknowledged that the country of origin information still expressed concern that the police and state security services abused suspects and resorted to torture techniques, but suggested nonetheless that there was a functioning police force "from which protection would be available to the applicant." While the Minister noted that there was still internal conflict in north eastern Uganda, the applicant nonetheless had the option of internal relocation:-

> "The applicant in this case lived and traded in the capital city, Kampala. It was for commercial reasons that she travelled to the north of the country, where the trouble exists and from where she was abducted. On being returned to Kampala to the 'safe-house', she maintains her torture began at the hands of troops who believed she was a rebel. Therefore, the armed conflict which is restricted to the north of the country, is outside the region of the applicant's abode. The torture she claims to have suffered was perpetrated outside of the area of the armed conflict. She is not compelled to remain in the north of the country, nor in Kampala where she lived, should she be returned. Therefore it is not unreasonable to expect her to locate internally within the country away from the troubles in the north and outside the city and region of Kampala."

11. On the question of whether the applicant had suffered "serious harm" within the meaning of Article 5(2) of the 2006 Regulations, the Minister noted:-

> "The applicant claims to have been subjected to serious harm as defined in Article 2(1) by way of being captivated, beaten, burned and raped. She has submitted Spirasi reports in relation to her injuries. The report of 28th August, 2005, states that the findings on physical examination are 'consistent with' her history of the repeated beatings and the burns that she alleges are sustained. The report of 23rd October, 2009, refers to the August, 2005 report and states that the 2005 examination was 'highly consistent' with the allegations; however, as stated above, the 2005 report states 'consistent with', as opposed to 'highly consistent with.'

12. The Minister then concluded by noting that the Tribunal had itself concluded that Ms. N.'s evidence:-

> "was not free of discrepancies, for example, in relation to her giving her travel times in hours versus miles, also her vagueness on other details, for example, she could not estimate numbers or explain who was responsible for her escape. In addition, she provided absolutely no evidence of how she arrived here. RAT concluded that, at best, her evidence points to her suffered injuries and having contracted sexually transmitted diseases, however it was impossible to say how the injuries and illnesses were caused."

13. It followed, therefore, that because of doubts regarding the applicant's credibility, Ms. N.'s case "does not warrant the benefit of the doubt", and that substantial grounds have not been shown for believing that Ms. N. "would face a real risk of suffering serious harm if returned to Uganda".

14. Pausing at this point before examining the Regulations, it is undeniable that, at some stage in the past, the applicant has suffered "serious harm" in the ordinary sense of that term. One cannot, I think, understand the 2005 Spirasi report as doing other than accepting that, at some point in her life, Ms. K. has been subjected to extensive burn injuries, lacerations and the pouring of scalding water on her lower abdomen. Of course, the authors of the 2005 Spirasi report also found that her injuries were "consistent" with her contentions that her breasts had been burnt and scarred and, furthermore, that her other parts of her body had multiple scars and lacerations which were consistent with repeated beatings and burns.

15. As we have already noted, the use of the term "consistent" in the Spirasi report implies that these injuries could have been caused in the manner alleged, but it is also important to recall that, in the language of paragraph 187(b) of the Istanbul Protocol:

> "the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes."

16. There is, however, a difference between (a) accepting that the person concerned suffered the injuries in question and (b) determining who inflicted those injuries and how they came about, although even though the - very helpful - Istanbul Protocol might seem to glide over this distinction in places. To my mind, however, the 2005 Spirasi Report seems to have demonstrated that the applicant *had suffered* the injuries in question, but that the clinicians in question could merely say that these injuries *could have been caused* in the manner alleged. There were, however, many other possible causes. But the real question is whether these scars, lacerations, irregular skin pigmentation and so forth were the result of the intentional infliction of harm on Ms. N. by another person or

whether, for example, the irregular pigmentation on her right abdomen might have come about by reason of a domestic accident involving boiling water. The widely dispersed nature of these scars, lacerations and irregular skin pigmentation identified in the 2005 Spirasi report strongly suggests that Ms. N. was the victim of the intentional infliction of injury by another person or persons which would not appear to have been caused by an accident or a series of accidents. The rest of this judgment proceeds on this basis accordingly.

17. It is against that background that we may now consider the 2006 Regulations.

The 2006 Regulations

18. Article 2(1) of the 2006 Regulations defines "actors of persecution or serious harm" as including:-

> "(a) a state,
>
> (b) parties or organisations controlling a state or a substantial part of the territory of that state, or
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> (c) non-state actors, if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm."

19. "Serious harm" is itself defined as "consisting" of:-

> "….(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin."

20. Article 5(2) provides:-

> "The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

21. One of the curious features of the 2006 Regulations is that while Article 2(1) defines the term "actors of persecution or serious harm", this term is nowhere used in the remainder of the Regulations. Passing over this possible anomaly, the nub of the problem in the present case is what is embraced by the term "serious harm". The statutory context here implies that the serious harm is perpetrated by the State actors or by third parties in circumstances where the State is either unwilling or unable to offer protection.

22. In the light of the findings of the 2005 Spirasi report, Ms. N. plainly suffered "serious harm" within the meaning of Article 2(1)(b) since, by any standards, the treatment she endured *at the hands of some person in some circumstances* was inhuman and degrading. The 2005 Spirasi report leaves open the question of whether this was at the hands of State actors in the manner alleged.

23. The 2006 Regulations are, of course, designed to transpose the Qualification Directive 2004/38/EC ("the 2004 Directive"). As the Court of Justice made clear (at para. 52 of its judgment) in Cases C-175/08 *et seq., Aydin Salahadin Abdulla* [2010] ECR I-1493:-

> "the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria."

24. Article 4(4) of the Directive provides:

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

25. While Article 5(2) of the 2006 Regulations mirrors Article 4(4) of the 2004 Directive, it goes somewhat further in that the final proviso - "but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection" - finds no counterpart in the 2004 Directive. Many of these issues were examined by Cooke J. in his very important judgment in *MST v. Minister for Justice, Equality and Law Reform* [2009] IEHC 529 and it may be opportune now to examine this case in some detail.

The decision in *MST v. Minister for Justice, Equality and Law Reform*

26. The decision in *MST* concerned a mother and a 12 year old daughter who were both ethnic Serbs. The mother had been born in the former Yugoslavia in 1955. She lived in Switzerland from 1991 to 2003, but she claimed that she had been badly treated by her former husband. Her daughter was born in 1997 during the course of another relationship. But in order to avoid harassment at the hands of her former husband, mother and daughter moved back to the mother's original family home in Croatia. However, as Cooke J. put it, this experience was not a pleasant one because:-

> "She claims that because they were ethnic Serbs she and her daughter were subjected to violence, threats and intimidation: they were spat upon in the street and their house was attacked and windows broken. In school, J. was bullied and subjected to violence. It is claimed that, as a result, they both still suffer from serious mental health problems."

27. Following the rejection of the asylum claim on the basis that the applicants had not sought police protection in Croatia, the Minister ultimately refused their subsidiary protection claim. In the subsequent judicial review proceedings, the applicant specifically relied on a particular incident which had occurred while they were in Croatia where the mother and daughter had been terrified by armed night time intruders who broke into their house. The gist of the applicant was that these events constituted evidence of "previous serious harm" which alone would have warranted the grant of protection and that the Minister had failed to consider it. It was emphasised that while other medical reports and documentation submitted had been itemised as considered in the analysis note of the Refugee Appeal Tribunal decision, the report of 21st January, 2008, is nowhere referred to in the Minister's file. That fact, combined with the report on the medical condition of the applicants and on the daughter, J., in particular, constituted "compelling reasons" warranting a determination that they were both eligible for protection but which the Minister has failed to consider.

28. Cooke J. summarised the issues thus:-

> "(a) Is Regulation 5 (2) when compared with the wording of the Directive which it implements, to be interpreted in the sense thus contended for namely, that a single previous incident of serious harm can alone constitute a basis of eligibility for subsidiary protection if it gives rise to "compelling reasons"?
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> (b) If it is to be so interpreted, does that provision constitute an addition to the terms of the directive and, if so, was it one which was intra vires the power of the Minister to make under s. 3 of the European Communities Act 1972?
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> (c) If the provision is a lawful addition, was the Minister obliged to treat the reference to the second incident in that medical report as evidence on behalf of the applicants of previous serious harm? and
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> (d) If so, does that evidence amount to proof of "serious harm" if taken on its own or in conjunction with the other evidence contained in the applicants' asylum claim?"

29. Having discussed the object of the 2006 Regulations as being to give effect to the 2004 Directive, Cooke J. went on to note the possible discordance between aspects of Article 4(4) of the Directive and Regulation 5(2). He first observed that:-

> "In the present case, however, Article 4(4) has been fully transposed verbatim by Regulation 5 (2) but the Minister appears to have gone further by the inclusion of the additional wording. The common parts of Regulation 5 (2) and Article 4(4) could be paraphrased as follows:
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> > (i) A claim to face a real risk of suffering serious harm must be regarded as having substantial grounds if the applicant establishes as a fact that he or she has already been subject to serious harm or to direct threats of such harm;
> >
> > (ii) The claim need not, however, be so regarded if there are good reasons to consider that such serious harm or threats will not be repeated."

30. Cooke J. then continued:-

> "29. The ordinary meaning of the additional wording appears to be that, what might be called a "counter-exception" to para (ii) above is created to the effect that, even if there is no reason for considering that the previous serious harm will now be repeated, the historic serious harm may be such that the fact of its occurrence alone gives rise to compelling reasons for recognising eligibility. While that appears to be the ordinary meaning of the additional wording it is not immediately clear how it is to be given effect in the context of the concept of subsidiary protection.
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> 30. As indicated above, subsidiary protection is accorded to someone who is not a refugee but is nevertheless in need of international protection. A person is eligible only when, if required to return to the country of origin he or she would "face a risk of serious harm". The risk of serious harm is thus one which is faced only on return to the country of origin. The person must be unable or, owing to that risk, be unwilling to avail of protection in the country of origin. If the meaning of the expression "person eligible for subsidiary protection" is read into the additional wording, the phrase becomes something of a non-sequitur: - "compelling reasons arising out of previous serious harm alone may nevertheless warrant a determination that the applicant is a person who, if returned to his or her country of origin, would face a real risk of suffering serious harm". If, however, on return, there is no danger of the previous serious harm being repeated, as the criteria of the common parts of the two provisions appear to envisage, it is difficult to understand in what would lie the real risk of serious harm upon return.
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> 31. That there must be a continuing real risk of further or other serious harm upon return when eligibility is recognised, is reaffirmed by the wording of Regulation 14 (1) (a) and (2) (transposing Article 16) which provide that subsidiary protection may be revoked if the circumstances which led to its grant ceased to exist or have changed to such a degree that international protection is no longer required, provided that the change of circumstances is "of such significant and non-temporary nature that the person no longer faces a real risk of serious harm".
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> 32. Notwithstanding the difficulties presented by the additional wording, there cannot be any doubt, in the Court's view, that the additional wording can only be construed as intending to permit some limited extension to the conditions of eligibility prescribed in Article 4(4) designed to allow some latitude in according subsidiary protection based exclusively upon the fact of previous serious harm when it is accompanied by compelling reasons. It is relevant to bear in mind that "serious harm" is defined as including "inhuman or degrading treatment"….It is possible therefore to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because the return itself could be so traumatic as to expose the applicant to inhuman or degrading treatment.
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> 33. The Court is accordingly satisfied that the additional wording does have some limited effect in extending the possible scope of application of Article 4(4). In particular, the wording appears to be designed to grant some latitude to the Minister to recognise eligibility for subsidiary protection in a case of proven previous serious harm giving rise to compelling reasons for according international protection notwithstanding the fact that there may exist some doubt as to the likelihood of risk of repetition of that previous serious harm."

31. Cooke J. then went on to examine the incidents which formed the basis of the subsidiary protection application. While the taunting, bullying and the use of racial epithets were "all undoubtedly frightening, stressful, painful and ugly", it could not be said that "they are such as amount to inhuman or degrading treatment on the basis of their essential character, duration or level of severity".

32. It was otherwise - or, least, potentially so - so far as the "second incident" involving the burglary and house break-in was concerned:-

> "52. While it may be possible to construe it as a single once-off burglary which might not, as such, amount to inhuman or degrading treatment; it is also capable of being seen, when taken in conjunction with the previous events, as part of a pattern of serious harassment of the applicants having regard in particular to the obvious intimidation intended in the

breaking up of furniture and the use of obscene and ethnic abuse.

53. What is important for present purposes, however, is that the potential significance of the "second incident" as a matter of fact does not appear to have been taken into consideration in the analysis that led to the Minister's refusal. Whether or not the evidence in its entirety constitutes a basis for proof of the fact of "previous serious harm" is primarily a matter which must be dealt with by the protection decision maker in the first instance as is the assessment as to whether the fact is accompanied by "compelling reasons". Although this is obviously a difficult and perhaps borderline case, the Court is satisfied that these applicants might be judged eligible for subsidiary protection if the "second incident" was considered as part of the "previous serious harm" on the basis that it involved inhuman or degrading treatment. It should be emphasised that the Court is not now deciding that this is a case in which the fact of such previous serious harm has been proved. It is deciding only that, having regard to the apparent absence of consideration of the "second incident" in the analysis upon which the refusal was based, it would be open to the protection decision maker upon a reconsideration of all of that information to reach a different conclusion.

54. It is possibly unnecessary to point out that while such a reconsideration involves an appraisal of past events so far as concerns the fact of previous serious harm, the test for a determination of eligibility for subsidiary protection remains a forward looking one. Thus, upon a reconsideration of the application, the appraisal of the 'compelling reasons' will necessarily take account of any changes that have taken place since September 2008 both in relation to the progress made in the medical treatment of the applicants in this jurisdiction and the prevailing conditions faced by ethnic Serbs in Croatia."

33. As Cooke J. further found in *MST* that the counter-exception proviso in Regulation 5(2) was an "incidental and supplemental provision to the transposition" within the meaning of s. 3(2) of the European Communities Act 1972, it would seem that this super-added provision must be treated essentially as a species of national law which hovers over the terms of Article 4(4) of the Directive, but is one which must nonetheless be interpreted in a manner compatible with the Directive itself. Moreover, as Cooke J. himself noted, the counter-exception - with its focus on past events - does not fit easily with the underlying purpose of subsidiary protection, namely, to mitigate the risk of exposing the applicant to the *future risk* of serious harm in the event of his return to his country of origin.

34. At the same time, as counsel for the Minister, Mr. Donnelly, observed, Article 3 of the 2004 Directive provided that Member States might introduce or retain more favourable international standards for determining who qualifies as a refugee or a person eligible for subsidiary protection, insofar as those additional standards are compatible with the Directive. Effectively, therefore, as Cooke J. pointed out in MST, the counter-exception must be construed as adding to Article 4(4) in a manner which is in ease of the applicant by providing for a more "favourable standard for determining eligibility for protection" and, on this basis, is thus compatible with Article 3.

The Minister's analysis

35. These considerations notwithstanding, Regulation 5(2) nonetheless falls to be applied in its entirety. What conclusions, accordingly, can be drawn at this juncture?

36. The task confronting the Minister was a three fold one. He was first required to ask himself whether the applicant had suffered "serious harm" in the past. If the answer to this question was in the affirmative, he was then required to consider whether were good reasons to consider that such persecution or serious harm would not be repeated should the applicant be returned to Uganda. If that question was affirmative (i.e., in the sense that it was considered that the risk of future persecution was small), the Minister was nonetheless required to consider the application of the counter-exception, namely, whether there were compelling reasons arising out of previous persecution or serious harm alone such as might nevertheless warrant a determination that the applicant is eligible for protection.

37. For the reasons I shall now explain, it is necessary for me only to consider the application of the first and third limbs of this test.

38. So far as the first limb of this test is concerned, it seems very likely from the medical evidence that Ms. N. suffered serious harm at some stage in her life in the sense that it was intentionally inflicted by a third party. This serious harm might have been inflicted in the manner which she has alleged, but, in the language of the Istanbul Protocol, there are many other possible causes. The Minister appears to have accepted that the applicant suffered the injuries alleged, but drawing attention to the use of the word "consistent" in its Istanbul Protocol, he took the view that there were many other possible causes for the injuries in question.

39. That might well be, but it still requires the Minister to address the question of whether the applicant did, in fact, suffer serious harm in the special sense of the Regulations, namely, whether the such injuries were inflicted by State actors in the manner alleged. Beyond a reference to the significance to the use of the term "consistent" in the context of the Istanbul Protocol and a later reference to the view of the Tribunal member to the effect that "it was impossible to say how the injuries and illnesses were caused", the Minister appears to have reached no firm view on this critical question.

40. Putting this another way, if one accepts that another person or persons intentionally inflicted these injuries, then the Minister must grapple with how these injuries were actually caused in the manner indicated by Cooke J. in *Pamba v. Minister for Justice, Equality and Law Reform*, High Court, 19th May, 2009. Specifically, the Minister must ask whether, in the light of the country of origin information, it is possible that such injuries were inflicted by State actors.

41. In these circumstances, therefore, it must be concluded that the Minister did not fully address his mind to the question of whether Ms. N. suffered "serious harm" in the sense envisaged by Regulation 5(2), Alternatively, it can be said that the reasoning here is defective in the Meadows sense (*Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701) in that the reasons for the conclusion on whether Ms. N. had in fact suffered serious harm in this sense is not sufficiently clear.

42. So far as the third limb of the test is concerned, it is plain from the decision in *MST* that the potential application of the counter-exception in Regulation 5(2) must also be considered. This means that if the Minister is satisfied that there is no reason for considering that the previous serious harm will now be repeated, he must nonetheless consider, in the words of Cooke J., whether the "historic serious harm may be such that the fact of its occurrence alone gives rise to compelling reasons for recognising eligibility." In this context, it should be recalled that the second Spirasi letter expressed the view that the forced repatriation of the applicant to Uganda "would serve only to reinforce the negative impressions that she has developed since her traumas."

43. The evaluation of this evidence and the consideration of this counter-exception is, of course, entirely a matter for the Minister in the first instance. But consider it he must. Yet an examination of the file does not disclose that the Minister ever gave any

consideration to the counter-exception in the original decision. This is a further reason why the decision cannot be allowed to stand.

Conclusions
44. In the light of the foregoing, I propose to quash the decision of the Minister of 4th April, 2010, as refused her subsidiary protection. I will accordingly remit the matter to the Minister for fresh consideration in the light of this judgment.