THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 1023 J.R.]

BETWEEN

C. K.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 12th day of December,2017

1. The applicant was granted leave to apply for judicial review for an order of *certiorari* of a decision made by the first named respondent on 26th October 2012 refusing his application for subsidiary protection, on the 17th December 2012. The applicant was also granted leave to apply for a declaration that the failure to provide him with an oral hearing or personal interview as part of a procedure by which the Minister determined the application for subsidiary protection was incompatible with the applicant's fundamental rights under European Union law and the right to be heard under Article 41 of the Charter of Fundamental Rights and Freedoms and Council Directive 2004/83/EC and that insofar as the European Communities (Eligibility for Protection) Regulations 2006 failed to provide for such an oral hearing or personal interview it was incompatible with the Directive.

Background

2. The applicant is a national of Cameroon. He was born on 3rd June, 1982. He left Cameroon on the 28th June, 2011 and travelling on a European passport and accompanied by a person called Collette travelled via France to Dublin where he claimed asylum the following day. He had previously travelled to Moscow, Russia in May 2009 using a Cameroonian passport issued in Yaoundé.

3. On his arrival in Dublin he claimed asylum. The application was based on the fact that his father K.A. was Chief of his local area. The applicant's father nominated him as his successor. His father died on 11th April, 2011. The applicant claimed that he did not wish to succeed his father due to the responsibility which that entailed of looking after his father's wives, children and following and upholding pagan traditions of acting as a spiritual link between the living and the dead in his community. He feared that his brothers would not be happy if he became Chief. He left the village after his father's funeral and went to Douala and stayed in his friend's residence. His friend contacted the woman Collette who arranged his departure from Cameroon. He states that he does not wish to return to Cameroon as he feared that because he refused to accept the Chieftaincy the people in his village will kill him. He could only be legitimately replaced as Chief if he died.

4. He furnished the details of his immediate family relationships and they included a partner E.I.B., his daughter N.K. who was born on 10th January, 2008, his brothers E.M.K. born 25th December, 1985, N.N.M. born 25th November, 1979 and two sisters K.D.D.V. and N.D.L. born about 1980.

5. He completed a s. 11 interview on 19th July, 2011 in which he gave an account of his education in Cameroon. He obtained his Baccalaureate in June 2003 and then studied at the University of Buea until July 2004. He then commenced his studies as a nurse and obtained various nursing qualifications between 2007 and 2011 in Cameroon.

6. The applicant set out in more detail the reasons why he left Cameroon and sought asylum. He stated that as a Christian he could not accept the duties cast upon him as the successor to his father which involved polygamous marriage and spiritual beliefs that the Chief was an intermediary between the spiritual world and the physical world with the community's ancestral dead. He believed that if he returned to Cameroon his life would be in great danger. He believed that the villagers would seek to kill him as he has acted contrary to their traditional and spiritual rituals including skull worship. Other relations who covet the position of Chief would seek to kill him because they wished to see their children succeed as Chief. The government would view the matter as a local tribal matter to do with traditional values. In addition his absence left the local village without a Chief to assist in the locality's administration and in particular during elections and campaigns in favour of the political party in power and would not therefore be protected by the civil authorities.

7. In the s.11 interview the applicant also acknowledged that he had been in contact with his best friend and his partner who had no problems in Cameroon at that time because she was not living near his family and they did not know where she lived. His family lived in a village in the Western Province. His partner lived with her family in a different area of Cameroon.

8. The applicant stated that he travelled on a false Portuguese passport which he returned to Collette. He claimed that he was not obliged to show his passport which did not contain a photograph when transiting through France at the airport. He claimed to have passed through immigration control at Dublin airport without any problems. He had no airline tickets, border cards, travel itinerary, baggage tags or any other documentation to indicate the route by which he came to Ireland because it had all been taken by the woman who accompanied him.

9. After his father's death when he was offered the chieftaincy the applicant did not initially decline it. He informed the elders of the village that he was refusing it a number of days later. He then left the village on 25th May, 2011. He had no difficulties when living with his friend having left the village for a period of one month. Though accepting that Cameroon had a population of approximately 20 million people, the applicant did not accept that he could not be found by people from his village trying to locate him if he moved away. He believed that their spiritual powers could locate him. He believed that if he went to the police for protection they would inform his local village because they believe in the traditions as well.

Decision of ORAC

10. By letter dated 7th September, 2011 the applicant was informed that the Refugee Applications Commissioner was recommending that he should not be declared a refugee. The s. 13 report from which the recommendation was based was exhibited.

11. The report concludes that it was difficult to substantiate in any real or meaningful way that the events the applicant described

had actually occurred in Cameroon given the inherently subjective nature of his claim. Country of origin information indicated that in the area which he described including his district and town of origin chieftaincy was seen as a position which carried immense prestige. The State was directly involved in the making of a Chief through its local district officers and no-one could be compelled to be made one. When a candidate declined an offer to be made a Chief an alternative candidate would be selected. There was no rule that stated that until a selected candidate died a Chief cannot be appointed. It was possible even to remove a serving Chief with the approval of the State.

12. The report questioned a number of aspects of the applicant's claim. It queried whether the applicant would not be allowed to live as a Born Again Christian if selected to succeed in his father as Chief in the manner outlined. It stated that the applicant had not provided the office with any evidence of the death of his father in Cameroon. The report stated that the explanation for failing to apply for asylum in France was not a reasonable one namely, that his friend had an arrangement with "Collette" to bring him to Ireland. The report also noted that he claimed to travel from Cameroon to Ireland using a Portuguese passport but was unable to inform the office of the name or date of birth which were on the document. He confirmed the photograph on the document was not his. The report considered it unlikely that he could have travelled from Cameroon via France to Ireland passing through Immigration in each country using somebody else's travel document. No evidence was produced of his journey to Ireland. It was considered that "this applicant may not have provided a true and accurate account of how he travelled to and arrived in this State".

13. The report also notes the applicant's failure to provide the office with any identity documents. He indicated that he had a Cameroon passport but when asked to request that it be sent to him he indicated that he would not be able to do so. He could only obtain a photocopy of it as it was illegal to post such a document.

14. The report concluded that when these issues were taken cumulatively the benefit of the doubt could not be afforded to the applicant and that he therefore had not demonstrated a well-founded fear of persecution in Cameroon. It noted that para. 38 of the "Handbook on Procedures and Criteria for Determining Refugee Status" stated that the benefit of the doubt should only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible and must not run counter to generally known facts.

15. The report also examined the issue of State protection and concluded that the applicant had not demonstrated a well-founded fear of persecution in Cameroon and therefore State protection was not relevant. It also concluded that his problem in Cameroon appeared to be localised in that he refused to accept the position of Chief in a district in West Cameroon. If he moved to another area of Cameroon it was considered that he could live in relative safety. He was a well-educated young man and did not appear to have any problems relocating and living in another part of Cameroon. He had done so for one month before leaving Cameroon. His claim that he could be located spiritually was deemed to be wholly subjective. His claim that he could meet a person who might cause difficulty for him on the streets where he might reside was deemed to be highly unlikely given the area and population of Cameroon.

Decision of the Refugee Appeals Tribunal
16. The applicant appealed this recommendation to the Refugee Appeals Tribunal. There was an oral hearing conducted on 26th October, 2011.

17. In its decision the Tribunal upheld the recommendation that he not be granted refugee status. It was satisfied that the claim of nationality was reasonably established on the basis of his oral evidence and general information concerning Cameroon.

18. The Tribunal then considered para. 38 of the UNHCR Book which stated that:-

> "To the element of fear – a state of mind and a subjective condition – is that of the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element and in determining whether a well-founded fear exists both elements must be taken into consideration."

19. The Tribunal considered whether the applicant's reasons for flight and fear of return were internally coherent and plausible or ran counter to generally known facts. In the s.11 interview when asked whether he refused the chieftaincy when offered initially at the time of his father's death he stated that he said nothing and did not decline it at that time. He informed the villagers that he was refusing it a few days later. He told them that it contradicted his Born Again Christian beliefs. At the Tribunal when asked whether the first time he was offered the chieftaincy was on the day of the funeral he replied in the affirmative. At that stage he gave no response. He was in shock He was given 7/9 days to think about it. The villagers returned and told him that he was his father's choice. He stated that he gave the villagers the impression that he was willing to accept the appointment. He did so because he did not know what to expect if he said no. It was pointed out to him that he had said at an earlier stage that he had declined the offer at the second meeting but was now indicating that he gave them the impression that he was willing to accept it. The Tribunal noted the contradictions in his evidence on this important aspect of his account.

20. The applicant did not accept that he had contradicted himself in this regard. This was deemed to be a critical aspect of the applicant's claim and the Tribunal concluded that the evidence given at the hearing contradicted the details provided at the interview. It found that his responses to questioning on the matter were contradictory and served to undermine his evidence.

21. The Tribunal also had regard, as required by s. 11B of the Act, to whether the applicant possessed identity documents and if not whether he had provided a reasonable explanation for their absence. The applicant submitted a copy of his passport and birth certificate. This was not the passport on which he travelled. He submitted a number of photographs at the hearing many of which showed that he had graduated as a nurse which the Tribunal accepted. Other photographs showed a funeral which he stated was his fathers and some village elders with his mother and aunt. The Tribunal was not in a position to verify or disprove the authenticity of these photographs or the circumstances in which they were taken.

22. The Tribunal also considered the applicant's description, set out above, of how he travelled to Ireland and his engagement with immigration officials en route. It concluded that the evidence raised doubts that he was able to use a false passport in the manner described. However this was not considered determinative of his application.

23. The Tribunal also referred to a perceived discrepancy as to whether he had been threatened by the villagers following his refusal. An allegation that there had been a threat to kill him only emerged at a late stage of the hearing and had not been mentioned in the questionnaire or interview. The Tribunal concluded that this was additional evidence which he could have provided at an earlier opportunity and constituted a lack of full cooperation with the asylum process. It stated:-

> "This evidence had the appearance of being tacked on at the hearing. While it did not arise from direct evidence it was not previously canvassed in interview or in questionnaire. I take the view that any attempt to fail to cooperate with the asylum process/add on new evidence to be a very serious matter. … I find that I do not consider this new evidence to be worthy of credit and … that its introduction at the eleventh hour serves to undermine the general credibility of the applicant."

24. The Tribunal then considered the cumulative effect of these findings on the applicant's credibility and concluded that it materially and detrimentally affected the veracity of what the applicant was alleging. The Tribunal was left with doubts and concluded it could not afford the applicant the benefit of the doubt when assessing his evidence. As a result, the applicant was deemed not to have a "subjective and credible fear" of persecution.

25. The Tribunal was also satisfied that the applicant had already been living away from his home village at the time he left Cameroon and that he could have availed of the opportunity to live elsewhere in a large country with a large population which would have reduced any threat (had it existed). His stated fear was from non-State entities and the Tribunal was satisfied that the applicant would have been able to access internal relocation as a means of avoiding serious harm based upon country of origin information available. The Tribunal stated:-

> "The core issue in this appeal is whether the applicant has provided evidence worthy of credit to discharge the burden that he in fact comes under the Convention Ground which he states. The points of discredit constitute direct and material links to the applicant's narrative. The fact that the applicant has made repeated statements which would be consistent with objective country of origin material would tend to support a recommendation for refugee status, unless there were reasons to the contrary. A substantial reason to the contrary is that I have not found him to be a (sic) credible. Therefore he has failed [to] establish, to the lowest standard of proof, that he has a subjective fear of persecution for a Convention reason. Accordingly the applicant has not discharged the legal burden upon him pursuant to s. 11(3) of the Act as amended.
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> Accordingly and as a result of all the foregoing:
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> (i) I am not satisfied that the applicant's credibility has been established.
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> (ii) The applicant has failed to establish by reliable evidence that he has been a victim of past persecution and more significantly the applicant has failed to establish by reliable evidence that he would be exposed to a risk of persecution.
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> (iii) While the applicant has expressed a fear of returning to his country of nationality, which, if believed, could be consistent with objective country of origin information, the applicant's statements are not plausible nor credible taking his evidence as a whole, and a subjective fear of persecution for a Convention reason has not been established to the satisfaction of the Tribunal."

The Tribunal confirmed the recommendation of the Refugee Appeals Commissioner that he not be granted refugee status.

26. The applicant was informed of the Minister's decision to refuse to grant him refugee status in a "three options letter" dated 31st January, 2012. This gave him the usual options of leaving the State before the Minister decided on a deportation order, consenting to a deportation order, or applying for subsidiary protection and/or submitting representations to the Minister under s. 3 of the Immigration Act 1999 setting out the reasons as to why a deportation order should not be made against him and that he should be granted leave to remain in the State. By separate letters dated 20th February, 2012 the applicant applied for subsidiary protection under the European Communities (Eligibility for Protection Regulations) S.I. No. 518 of 2006 and for leave to remain in the State under s. 3 of the 1999 Act.

Subsidiary Protection

27. In his application for subsidiary protection the applicant claimed that he feared torture or inhuman and degrading treatment or punishment in Cameroon on the basis of his religion and based on the factual background already set out in his file. It was submitted that the treatment already suffered by him supported his contention that he was at risk of further torture if returned and this was borne out by country of origin information. It was also submitted that there was no protection against serious harm available in Cameroon and no effective legal system in operation for the detection, prosecution or punishment of acts constituting serious harm allegedly suffered by him. Furthermore, there was no part of Cameroon where he would not be at risk of suffering serious harm.

28. The applicant also submitted a handwritten statement in support of his application. He believed that the villagers who wished him to be their Chief were still looking for him in order to return him to his village and take up his priestly duties. The villagers' beliefs were traditional and totally rejected by the applicant who is now a Christian. The traditional beliefs involved the worship of human skulls and entering into contact with ancestors through spirits of the dead. He did not wish to participate in such rituals but believed that he would be compelled to do so if returned to Cameroon. He sought subsidiary protection in order to free himself from the stress and worry of having to return to Cameroon where he would feel under threat. County of origin information was also submitted in support of the application.

29. By letter dated 26th October, 2012 the applicant was informed that the Minister had determined that he was not a person eligible for subsidiary protection and was furnished with a report setting out the Minister's determination.

30. The "determination of application" quoted extensively from and relied upon the Refugee Appeals Tribunal's decision in respect of the applicant's credibility under Regulation 5(3) of the Eligibility for Protection Regulations. An extensive quotation from the Tribunal decision on credibility, including the quotation set out above, is set out in the determination at pp. 1 to 6.

31. The determination states:-

> "The foregoing quotations from the member of the Tribunal indicate, *inter alia*, that core elements of the applicant's account are not capable of being believed. With regard to the applicant's account of what happened when he was asked to be Chief and the days following when he refused, the member of the Tribunal stated that this is a critical aspect of the applicant's claim and found that the evidence he gave at the hearing contradicted the details he gave at the interview. The member of the Tribunal was satisfied that the applicant was given the opportunity to clarify this matter but his responses were contradictory and served to undermine his evidence.

> With regard to the applicant's claim to have been threatened, the member of the Tribunal stated that this evidence had the appearance of being tacked on at the hearing. The member of the Tribunal stated that he takes the view that any attempt to fail to cooperate with the asylum process or add on new evidence was a very serious matter [and] … that he did not consider this new evidence to be worthy of credit and found that its introduction at the eleventh hour serve[d] to undermine the general credibility of the applicant.
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> The member of the Tribunal concluded that the cumulative effect of the foregoing findings relating to the applicant's credibility, materially and detrimentally affected [his] veracity ...."

The determination then reaches the following conclusion:-

> "In light of the foregoing, it is reasonable to consider that the applicant's statements in relation to his claimed fear of returning to Cameroon are not credible. As a result, I am satisfied that the applicant's claim is not credible."

32. The determination also addressed the question whether the applicant had been subjected to "serious harm" and in particular threats allegedly received when he refused to succeed his father as Chief following his father's death in April 2011. Once again the determination relied upon findings by the member of the Tribunal who had raised a number of issues in relation to the credibility of the applicant's claim. Having cited the Tribunal's findings concerning the applicant's veracity or credibility the determination states:-

> "It is not accepted that the applicant was previously subjected to serious harm".

In recommending a refusal of the application for subsidiary protection the executive officer stated that she was not satisfied with the credibility of the applicant's claim having considered the papers on file and the issues set out in the determination. Ms. Lee, a higher executive officer having considered the application and the recommendation agreed with it and determined that the applicant was not eligible for subsidiary protection.

Grounds of Challenge

33. The court granted leave to apply for judicial review on the grounds set out at paras. e(3) and e(4) of the statement of grounds dated 13th December, 2012 namely:-

> "(3) … in refusing the applicant's subsidiary protection application with reference to the reasons why the applicant's asylum application had been refused, without conducting a personal interview and/or oral hearing, the Minister acted in breach of natural justice and fair procedures and/or in breach of Council Directive 2004/83/EC and/or the applicant's fundamental rights under European Union law and in particular the right to be heard and/or Article 41 of the Charter of Fundamental Rights and Freedoms.
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> (4) Further in the alternative, in failing to provide for an oral hearing and/or personal interview as part of the procedures by which the Minister determines an application for subsidiary protection the European Communities (Eligibility for Protection) Regulations 2006 are incompatible with Council Directive 2004/83/EC and/or the applicant's fundamental rights under European Union law and, in particular, the right to be heard and/or Article 41 of the Charter of Fundamental Rights and Freedoms."

Ground e(3) was subsequently amended as set out later in the judgment.

34. In the statement of opposition delivered by the respondent it is claimed that in the circumstances of the case the applicant was not entitled to a personal interview or an oral hearing during the course of the subsidiary protection process. The respondent submitted that there was no obligation imposed on the State by Council Directive 2004/83/EC to provide for an oral hearing or personal interview in his subsidiary protection application. The right to be heard under European Union law entitled the applicant to make known his views effectively during his subsidiary protection application process. It was therefore denied that the respondent acted in breach of natural justice or fair procedures.

35. This case is one of a number of cases which raised a claimed entitlement of an applicant for subsidiary protection under the Irish bifurcated procedure to an oral interview or hearing. This issue was raised in a number of cases including Case *C-277/11 M.M*. [2012] ECR1-0000, *M.M. v. The Minister for Justice and Law Reform* [2013] 1 I.R. 370 and more particularly in *M. v. Minister for Justice and Equality* (Case *C-560/14*) (9th February, 2017).

36. In Case *C-277/11* the CJEU was requested by Hogan J. to provide a preliminary ruling concerning the compatibility of the procedure for determining subsidiary protection applications in Ireland with EU law. The following question was referred:-

> "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 held that Article 4(1) of the qualification directive did not impose such a requirement. It went on to consider more generally the question of the right of a foreign national to be heard in the course of the examination of his application for subsidiary protection where that application is made in a two stage or bi-furcated process.

37. The court stated:-

> "91. … 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.
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> 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…

> 94. It is in the light of … 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."

The court concluded that it was for the national court to ensure observance in it's separate 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".

38. Hogan J. having considered the answers given by the CJEU in the preliminary ruling interpreted and applied them as follows:-

> (31) "The European 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 bifurcated 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 revisit 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.
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> 32. The conclusion is underscored by the European 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. …"

39. In *M.M*. Hogan J. 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.
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> 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
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> (i) the applicant was invited to comment on any adverse credibility findings made by the Refugee Appeals Tribunal;
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> (ii) the applicant was given a completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection; and
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> (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.
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> 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 …"

40. An appeal was brought against the decision of Hogan J. to the Supreme Court which then referred a further question to the CJEU in *M. v. Minister for Justice and Equality* (Case *C-560/14*) as follows:-

> "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?"

41. The CJEU held that the right to be heard applicable in the context of Council Directive 2004/83/EC did not require as a rule that where national legislation such as that in issue in the main proceeding provides for a bi-furcated process, the applicant for subsidiary protection must have a right to an interview relating to his application and the right to call or cross-examine witnesses when that interview takes place. However, it stated:-

> "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."

42. The court stated that it did not follow from its earlier judgment that an interview must necessarily be arranged under the procedure relating to subsidiary protection. There was an obligation to ensure that the right of the applicant for subsidiary protection

to be heard must be observed even if he has already been heard in the course of an examination of his asylum application. However, the court did not impose an obligation that an oral interview relating to the application for subsidiary protection must be arranged in all circumstances. It stated that 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 a right to be heard before a decision on his application is adopted. The court was satisfied that the relevant elements of a fair hearing required the decision maker to take into account statements and documentation concerning the applicant's age, background, identity and nationality, country of previous residence, previous asylum applications, travel routes, his reasons for applying and the serious harm to which he has been or may be subject and the applicant's general credibility. These issues could be canvassed effectively by means of written statements by the applicant accompanied where appropriate by documentary evidence. The system should be sufficiently flexible to allow an applicant to express his views and comment in detail on the elements to be taken into account and set out any information or assessments additional or different to those already submitted when his asylum application was examined.

43. 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". The nature of such specific circumstances was also considered by the court. The referring court had the task of establishing whether such circumstances exist. The court added that an interview must be arranged if the competent authority is not objectively in a position on the basis of the elements available 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 or whether he is unable or owing to such risk unwilling to avail himself of the protection of that country. An interview might allow the competent authority to question the applicant regarding the elements which were lacking for the purpose of taking the decision on the application and establishing whether the conditions laid down in Article 4(5) exist. An interview should also be arranged in the light of the personal or general circumstances of the application in particular if there is any specific vulnerability of the applicant due to his age or state of health or the fact that he has been subjected to serious forms of violence.

44. The CJEU also held that an applicant did not have the right to call and cross-examine witnesses at such an interview. That process went beyond the requirements that ordinarily arose in the right to be heard in administrative procedure. Furthermore, the procedure applicable to the examination of applications for subsidiary protection in Article 4 of Directive 2004/83 did not confer particular importance on testimony in order to assess the facts and relevant circumstances.

45. The court is satisfied that applying the principles set out in Case C-560/14 no "specific circumstances" exist in this case that would have required an interview with the applicant during the subsidiary protection process as discussed in that case. The issue awaits a further determination by the Supreme Court in the pending MM appeal but it is clear that even if required such an interview does not include a right to cross-examine or call oral testimony. The court is satisfied that grounds e(3) as originally drafted and e(4) which are limited to a claim that the applicant should have been accorded a right to an oral interview or hearing are not well founded and must be rejected.

46. The *MM* cases were considered and applied by this Court in *M.L. and others v. The Minister for Justice and Equality* (unreported High Court 20th June, 2017 McDermott J.). It was accepted in the course of the hearing of this case that the decision of this Court on these issues in *M.L.* and in *M.M.* would likely determine the issues raised in this case.

47. Having initially argued that the grounds were wide enough to embrace all issue raised in *MM* an application was made to amend the grounds by adding the following to ground e (3)

> "...and/or by relying in substance on the findings of the Tribunal, without a completely fresh, separate and independent assessment by the respondent and/or without an invitation to the Applicant to comment thereon and/or by reason of a failure to consider fresh material submitted by the Applicant. "

In *M.L.* an amendment of grounds which specifically raised similar issues apart from the fresh material element of the proposed amendment, was granted. The applicants in *M.L.* were ultimately successful on those grounds. The respondent in this case initially submitted that grounds e(3) and e(4) were confined to the specific issue relating to the failure to provide the applicant with an oral interview or hearing which was addressed in the later reference in Case C-*560/14* and opposed the proposed amendment. The court indicated its willingness to consider such an application notwithstanding that it was made at a late stage.

48. On the 26th November 2013, after the conclusion of the hearing and at a stage when judgment had been reserved the respondent withdrew its opposition to the proposed amendment in the context of an application to seek a reference to the CJEU. This application was ultimately overtaken by other events and not granted. When making that application the parties agreed that the proposed amendment should be allowed and an amended statement of grounds would be filed. In addition, the respondent consented to the granting of leave to apply for judicial review in respect of the deportation order and withdrew its objection that the application for leave was out of time.

49. The court has considered the proposed amendment and is satisfied to allow it in the unusual circumstances of the case. The court acknowledges that this application was not supported by affidavit but it is in relation to a legal issue concerning fair procedures in subsidiary protection applications which was the subject of extensive consideration by the CJEU and in respect of which domestic courts have an obligation to ensure that applicants are accorded a fair and independent hearing. It was made 11 months after the initial application for leave on the 17th December 2012 but at a time when the *MM* series of cases was progressing through the domestic courts and the CJEU. The judgment in *MM* by Hogan J. following the first reference was not delivered until 23rd January 2013. Indeed the full ramifications of aspects of that case may still fall to be considered by the Supreme Court following the second reference to the CJEU. Since these legal issues were in a state of some uncertainty and given their fundamental importance to the applicant's case I am satisfied as a matter of justice that I should amend the ground as now agreed. Furthermore, the facts of the case which were not in dispute clearly indicate that on the basis of these two decisions the applicant had a strong argument case based on paragraphs 46, 47 and 48 thereof quoted above. I am not satisfied that the proposed amendment involves a significant enlargement of the applicant's case. It did not give rise to an exchange of further affidavits or a claim for wider relief than that claimed. If denied it would have deprived the applicant of a serious argument on issues the resolution of which are also in the wider public interest and may contribute to creating certainty on the appropriate standard of fair procedures applicable to a subsidiary protection application (see *Keegan v. An Garda Siochana* [2012] IESC 29 per Fennelly J. at paras 30-39).

50. The court is satisfied that the principles of fair procedures applicable to an application for subsidiary protection in a bi-furcated system as determined by the CJEU in Case *C-277/11* and applied by Hogan J. in *M.M.* and as adopted and applied by this Court in *M.L.* necessarily means that the reliance by the decision-maker in the determination of the application for subsidiary protection upon the credibility findings and determinations of the Refugee Appeals Tribunal in an asylum appeal constitute a fundamental flaw in the

decision making process. It is clear from the contents of the subsidiary protection determination in this case and the extensive and explicit reliance on the Tribunal's findings of fact and credibility against the applicant which are quoted extensively that these findings were essentially adopted in their entirety in the subsidiary protection decision. There is no evidence that the applicant was invited to comment on any adverse credibility finding made against him by the Refugee Appeals Tribunal or offered or afforded a fresh opportunity to revisit any or all matters bearing on his claim for subsidiary protection or that there was a fresh and independent assessment made of his credibility in the course of the subsidiary protection process. I am satisfied on the basis of *M.M. v. Minister for Justice* (Hogan J.) that it is essential that an applicant be given an opportunity to address adverse credibility findings such as those quoted so extensively in the subsidiary protection decision from the Refugee Appeals Tribunal decision. This requires a fresh opportunity to revisit matters bearing on the claim for subsidiary protection having regard to the requirement that there be a separate and independent adjudication on that claim.

Conclusion
51. The court accepts the submission that an applicant for subsidiary protection has a right to fair procedures which involves a separate and independent decision making process and that the adverse credibility and other conclusions reached in the asylum process and in particular, by the Tribunal should not be relied upon by the decision maker in respect of a subsidiary protection application in the manner set out above. The court is satisfied to grant the application to quash the subsidiary protection decision on the basis of the amendment granted to ground e(3).

52. The court is also satisfied for the reasons set out in the judgment that the decision to refuse the application for subsidiary protection should not be quashed on the ground that there was a failure to provide the applicant with an oral interview or hearing.

53. The court was informed that the applicant's status in the State has now changed and that he now has leave to remain in the State. It is therefore unnecessary to rule upon the deportation issue save to observe that the application to quash the deportation order was largely based on the challenge to the subsidiary protection decision. Since it was successful it follows that the court would have granted the relief claimed.