Neutral Citation: [2014] IEHC 562

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 362 J.R.]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, SECTION 5 AND IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)

BETWEEN/

V.I.O.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND GARDA NATIONAL IMMIGRATION BUREAU

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered the 4th day of December, 2014

1. This is a telescoped application by way of judicial review for an order of *certiorari* quashing the decision of the Minister refusing the applicant subsidiary protection, dated 11th January, 2010; and for an order of *certiorari* quashing the deportation order made in respect of the applicant, dated 19th January, 2010.

2. These proceedings were instituted on 24th March, 2010. The first return date was 26th April, 2010. However, the applicant left the State in January 2011, and is now back in Nigeria. He made his own travel arrangements rather than be deported from the State by the authorities. An injunction application in respect of the deportation order was made at the eleventh hour but this was refused by Birmingham J. due to the late nature of the application.

Extension of time

3. The applicant requires an extension of time to challenge the deportation order under s. 5(2) of the Illegal Immigrants (Trafficking) 2000 Act. He submits that there are good grounds for that extension. In an affidavit sworn on 24th March, 2010, the applicant stated that he received the deportation order on 27th January, 2010. He immediately contacted his solicitor and arranged to meet him soon thereafter. He stated that he informed his solicitor that he wished to challenge the validity of the deportation order and the file was sent to counsel for his opinion under cover of letter dated 9th February, 2010. Further instructions relating to the applicant's case were sought and pleadings were settled and returned to the applicant's solicitor on 3rd March, 2010. The applicant stated that further instructions had to be taken and unfortunately, due to his medical condition, the earliest he could attend to meet with his solicitor was 24th March, 2010.

4. The applicant stated that he attended at the Adelaide and Meath Hospital on 10th March, 2010, for an out patient appointment. However, he was kept overnight and was formally admitted to hospital on 11th March, 2010. At that time he was suffering from a distal tibia wound site infection which was delaying bone healing. It was treated intravenously with antibiotics and the applicant underwent a surgical procedure to wash out the wound. He was advised that he would require treatment with the external fixater in place for at least a further six months.

5. I am satisfied that the applicant did form the opinion that he wished to challenge the deportation order within the time period allowed. I accept that, due to his health issues, he was not in a position to finally swear the affidavit until 24th March, 2010. In the circumstances, where there is no obvious prejudice to the respondents, it is appropriate to extend the time within which the challenge to the deportation order may be made. I extend the time period up to and including 24th March, 2010, being the date on which these proceedings were commenced.

Background

6. The applicant was born on 9th September, 1966, and is a Nigerian national. He is a Christian and a member of the Igbo tribe. He arrived in Ireland and applied for asylum in December 2006. The Office of the Refugee Applications Commissioner ("ORAC") recommended that he be refused refugee status, and the Refugee Appeals Tribunal ("the RAT") affirmed this recommendation. On 25th June, 2009, the applicant submitted an application for leave to remain in the State pursuant to s. 3 of the Immigration Act 1999. By letter dated 24th June, 2009, the applicant submitted an application for subsidiary protection in the State. The Minister refused this application on 11th January, 2010. By letter dated 26th January, 2010, the applicant was informed of the Minister's decision to issue a deportation order in respect of him.

7. In this case, the applicant seeks to challenge the Minister's decision to refuse his subsidiary protection application and the decision to make a deportation order. The decisions of ORAC and the RAT stand unchallenged.

8. The applicant, who was a lawyer in Nigeria, claims to have been a member of the Movement for the Actualisation of the Sovereign State of Biafra ("MASSOB"). MASSOB is a secessionist movement, which aims to establish a separate country forthe Igbo people of south-eastern Nigeria. The Nigerian government is strongly opposed to MASSOB. Several members of the organisation have been arrested and detained for months, despite MASSOB's insistence that it is a peaceful organisation. The applicant claims that he acted as a legal advisor to MASSOB.

9. As a result of his involvement in MASSOB, the applicant claims to have come to the attention of the Nigerian authorities and claims to have been arrested in December, 2005. Subsequent to this, the applicant moved from Delta State to Lagos where he worked as a lawyer. He only returned to Delta State to carry out MASSOB activities. He also stated that he provided legal representation for MASSOB members. On 25th February, 2006, the applicant travelled from Lagos to Onithsa, Anambra State, to attend a MASSOB

regional meeting, accompanied by officials from Delta State. That night, the applicant claims to have been attacked while sleeping in his bedroom. He heard a loud bang at his window, and heard people shouting *"wake up, open the door!"* The applicant escaped through the kitchen window but he was shot in the leg when attempting to jump across a garden fence. He was taken to hospital where he spent several months recovering from his injuries. During this time, the applicant stated that anonymous telephone calls were made to his law office stating that the gunshot wound *"served him right*."

10. The applicant believes that this attack was state sponsored. He gives a number reasons for this. First, he states that there was money and valuables in his house on the night of the attack, but these were not taken. Second, his house is a basic four-bedroombungalow and there are better houses in the neighbourhood. Third, the applicant asserted that his only activities in Delta State were MASSOB related; that the government clamped down on MASSOB at this time, and that there were attacks on other MASSOB members in the region. Fourth, the applicant said that files relating to MASSOB were removed from his house – he had two MASSOB court cases pending at the time. For these reasons the applicant believes that the Nigerian government is behind this attack, as part of their clampdown on MASSOB activities.

11. Subsequent to his discharge from hospital in July 2006, the applicant claims that MASSOB intelligence sources informed him that he was not safe in Nigeria. He stayed in Onitsha from August to September 2006. He decided to leave Nigeria when the threats against him became more constant and MASSOB intelligence advised him that it was unwise for him to remain in the country. He contacted the leader of his church in Lagos who helped to organise his journey to Ireland. He travelled by air to Ghana, Amsterdam, and Belfast; he then travelled to Dublin by car, where he arrived on 4th December, 2006.

12. In his subsidiary protection application, the applicant claimed that his injury required further treatment, and that this would be hampered if he was returned to Nigeria. He also stated that if returned to Nigeria he will be killed. On his subsidiary protection application form, the applicant indicated that the basis on which "serious harm", as defined in Article 15 of Council Directive 2004/83/EC of 29th April, 2004,("the Qualification Directive"), and transposed in Regulation 2(1) of the Eligibility for Protection Regulations, 2006 (S.I. 518/2006) ("the Protection Regulations"), was being claimed, was as follows:

> (i) torture, inhumane or degrading treatment or punishment of an applicant in the country of origin (Article 15(b));
>
> (ii) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c)).

13. The first ground is at issue in the present proceedings.

The applicant's case

14. At hearing, the applicant raised four main issues:-

> (i) That the Minister, in deciding his subsidiary protection application, failed to consider whether the applicant was at risk of serious harm, as defined in Article 15(b) of the Qualification Directive, by reason of his involvement with MASSOB. The applicant asserts that the Minister answered a question about medical treatment in Nigeria, which was a different question to that which was put to him.
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> (ii) That even if the Minister did address the correct question, no reasons, or insufficient reasons, were given for his decision.
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> (iii) That the Minister did not have sufficient grounds to reject the applicant's credibility and that the Minister failed to identify the part of the applicant's story unsupported by documentary evidence.
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> (iv) That there cannot be a valid deportation order in the absence of a lawful determination of the subsidiary protection application; if the subsidiary protection decision falls, so too must the deportation order.

Article 15 of the Qualification Directive

15. Article 15 of the Qualification Directive provides that "serious harm" consists of:-

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

16. This article was transposed directly into the Irish law in Regulation 2 of the Protection Regulations. It will be observed that while Article 15(c) clearly requires that the harm should arise in a situation of armed conflict, there is no such requirement in Article 15(b). As Charleton J explained in *F.N. v. Minister for Justice, Equality and Law Reform &Ors* [2009] 1 IR 88:

> *Having considered the relevant definitions in the light of the relevant recitals, it seems to me that, depending on an assessment of the facts, a non-citizen may be entitled to subsidiary protection in a member state where:-*
>
> > *(1) no substantial part of an applicant's country of origin is capable of providing them reasonable protection, through police and criminal justice services, from a real risk of suffering serious harm, or worse, through human action arising from international or internal armed conflict;*
> >
> > *(2) a substantial territory within the country of origin can provide an applicant with a haven, despite international or internal armed conflict, against a real risk of suffering serious harm, or worse, through human action, either under the control of the country of origin, or another country, or of an international organisation, but the conditions in that place are so serious from the point of view of resort to police and criminal justice protection, or from animminent risk of international or civil war, that having regard to the personal circumstances of the applicant, he or she cannot reasonably have been expected to relocate there before applying for international protection or cannot reasonably now be returned there;*

(3) an applicant is likely to suffer a real risk of being executed other than in accordance with due process of law in respect of a crime which is not internationally recognised as being so serious as to be responsibly considered as allowing for imposition of the death penalty, discounting, as I am obliged to, Ireland's opposition to that punishment on the basis of its obligations to implement European law;

(4) an applicant is likely to suffer a real risk of torture or inhuman or degrading treatment at the hands of his or her country of origin authorities or, if the apprehended harm comes from a non-State source, then (1) or (2) above applies or the situation in the country lacks any reasonably functioning police and criminal justice protection and no haven as in (2).

17. The applicant submitted that he does not take issue with the Minister's assessment of whether a situation of armed conflict existed in Nigeria. This assessment was relevant to the Article 15(c) ground on which the applicant sought subsidiary protection, i.e. serious harm consisting of a "*serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict*." It is clear that the harm alleged under Article 15(c) must arise in a situation of international or armed conflict. Having conducted anextensive analysis of the relevant country of origin information, the Minister concluded that such a situation does not exist in Nigeria. The applicant does not contest the accuracy of this finding in these proceedings.

18. Instead, the focus of the applicant's attack on the subsidiary protection decision is that it fails to consider the Article 15(b) ground on which serious harm is alleged, namely, "*torture or inhuman or degrading treatment or punishment of an applicant in the country of origin*." It is clear that this ground does not require the serious harm to arise in a situation of armed conflict. As Charleton J held in *F.N. v. Minister for Justice, Equality and Law Reform & Ors* [2009] 1 IR 88, subsidiary protection may be available in circumstances where "*an applicant is likely to suffer a real risk of torture or inhuman or degrading treatment at the hands of his or her country of origin authorities..."* The applicant's claim under this heading is that he has suffered a gunshot wound, perpetrated by the Nigerian authorities, in response to his MASSOB activities; and he fears further such attacks on his person if deported. The applicant submitted the subsidiary protection report does not address this issue.

The Subsidiary Protection Report

19. The subsidiary protection report, having set out the facts of the applicant's case, stated that:-"*the issue to be considered here is the applicant's fear of suffering serious harm in Nigeria at the hands of those he believes responsible for the attack he suffered*." The report continued:-

> *"The question to be answered is whether substantial grounds have been shown for believing that the applicant, if returned to Nigeria, would face a real risk of 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin' or 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' and, critically, whether protection is available and accessible to the applicant."*

20. The applicant submitted that the Minister asked himself the right question but ultimately answered a different and irrelevant question regarding health care in Nigeria which had not, in fact, been put to him.

21. The report went on to note that "*the applicant's claim for subsidiary protection centres on his fear of suffering serious harm at the hands of State agents due to his involvement with MASSOB."* This seems to be the Article 15(b) assessment. The report then proceeded to an "*assessment of facts and circumstances*". This consists of extensive quotations from country of origin information concerning: (i) MASSOB; (ii) the Nigerian security forces; (iii) avenues of complaint about police misconduct; (iv) freedom of political expression; (v) freedom of association and assembly; and (vi) a medical issues overview. At the end of this section, the report commented:-

> *"As can be seen from the above country of origin information there are medical facilities available to the applicant in Nigeria. While the level of serviceprovided may not be on a par with what is offered in this State it is notaccepted that the applicant is entitled to subsidiary protection on this basis."*

22. The report then makes reference to the judgement of Charleton J. in *F.N. v. Minister for Justice* [2009] 1 IR 88, where the learned judge rejected the applicant's argument that he was entitled to the benefit of the health system in Ireland and that, in light of his illness, he should not be returned to Nigeria where the standard of medical care is poor. Charleton J. held: "*The principle of protection contained in the regulations is against human action. It is not against illness or natural disaster*."

23. The subsidiary protection report then concluded as follows:

> *"In this regard, it is not accepted that the applicant is entitled to subsidiary protection by reason of his medical condition and the lower standard of treatment which would be available to him in Nigeria compared to the treatment which he is receiving in this State."*

24. The applicant argued that in making this finding, the Minister answered a question which was not, in fact, put to him. I am of opinion that the applicant's submission in this regard is well made. The report starts by correctly framing the issue as a consideration of the applicant's claim for subsidiary protection based on his fear of suffering serious harm at the hands of State agents due to his involvement with MASSOB. It then quotes country of origin information on MASSOB, the Nigerian police and security forces, and freedom of expression, assembly and association in Nigeria. At the end of the country of origin information, some information is quoted regarding the health care system in Nigeria. The report then makes findings in respect of the Nigerian health care system only; no reference whatever is made to the question which was set out at the start of the section concerning the applicant's fear of serious harm from Nigerianstate actors on account of his MASSOB activities.

25. It seems to me that, in the course of her consideration of the country of origin information, the decision maker lost sight of the original question and became side-tracked by the health care information. Whatever the explanation, the decision maker ended up answering a different and indeed irrelevant question regarding health care in Nigeria, and completely failed to address the question that was relevant to the applicant's Article 15(b) claim. I am satisfied that the applicant is entitled to an order of *certiorari* on this account.

26. In the next section of the report the Minister considers Article 15(c). In doing so, the report examines whether a situation of armed conflict exists in Nigeria. In light of the country of origin information, the Minister concludes that such a situation does not exist. The report then concludes as follows:-

Overall, and having regard to all the facts on file, I am not satisfied that the applicant has demonstrated that he is without protection in Nigeria and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm by 'death penalty or execution' [Article 15(a)] 'torture or inhuman or degrading treatment' [Article 15(b)] or 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' in Nigeria [Article 15(c)] if he is returned there.

27. It will be observed that this conclusion rejects the applicant's claim under all three grounds set out in Article 15 of the Qualification Directive. The rejection in respect of Article 15(a) is unnecessary because the applicant made no claim under that section. The rejection under Article 15(c) is not in issue – the applicant accepts that this determination is correct. It is the rejection of the Article 15(b) claim, which is done without having considered that claim and, consequently, without providing any rationale for its rejection, that is the crux of the present case.

28. The respondent submitted that for the purpose of a subsidiary protection application an applicant must show serious harm within a particular context or contexts. The respondent further argued that the applicant had not explained how the facts as alleged would bring him within the ambit of the Article 15(b) category of serious harm. The respondent stated that no authority had been cited in relation to whether the facts as alleged would constitute torture or inhuman or degrading treatment or punishment. The respondent submitted that there simply is no authority to suggest that the factual matrix alleged in these proceedings comes within the subsidiary protection category relied upon. The respondent submitted that a glance at the textbooks on this area supports his view – examples of the type of harm covered by Article 15(b), he said, included corporal punishment. This, counsel submitted, is not such a case. Counsel stated that if the applicant was correct in his submission that all that was needed to succeed in a subsidiary protection application was serious harm, then there may be a chance of success. However, the respondent submitted that it is in fact serious harm defined within a particular context that is needed for an entitlement to subsidiary protection to arise.

29. It seems to me that the respondent's submissions in this regard are misconceived. The terms of Article 15(b), and Charleton J.'s judgment in *F.N.*, both support the view that the harm arising under Article 15(b) need not occur in a particular context; the particular context requirement only seems to arise under Article 15(c). All that is required for the purposes of Article 15(b) is that the applicant be likely to suffer a real risk of torture or inhuman or degrading treatment at the hands of his or her country of origin authorities if returned.

30. The respondent argued that being shot or the threat of being shot is not such as to come within the definition of "torture or inhuman or degrading treatment or punishment". However, the court notes that the jurisprudence of the Court of Justice of the European Union ("the CJEU") states that Article 15(b) is the equivalent of Article 3 of the European Convention on Human Rights. Article 3 ECHR provides that: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*." In *Elgafaji v. Staatssecretaris van Justitie* (C 465/07) the CJEU held, at para. 28 of its judgment:

> *"...while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR."*

31. In *Bondo v. Minister for Justice and Equality* [2012] IEHC 454,Mac Eochaidh J. relied upon the CJEU's judgment in *Elgafaji*, and stated as follows:

> *The ECJ has addressed the distinction between the types of harm in respect of which protection may be sought in Case C-465/07 on 17Th February, 2009, Elgafaji v. Staatssecretaris van Justitie . The Dutch referring court wished to know whether a person seeking protection within the meaning of Article 15(c) of the Directive was required to produce evidence that he or she was specifically targeted by reason of factors peculiar to his or her circumstances. The Court of Justice said as follows:*
>
> > *"31. In order to reply to those questions, it is appropriate to compare the three types of 'serious harm' defined in Article 15 of the Directive, which constitute the qualification for subsidiary protection, where, in accordance with Article 2(e) of the Directive, substantial grounds have been shown for believing that the applicant faces 'a real risk of [such] harm' if returned to the relevant country.*
> >
> > *32. In that regard, it must be noted that the terms 'death penalty', 'execution' and ' torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15(a) and (b) of the Directive, covers situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.*
> >
> > *33. By contrast, the harm defined in Article 15(c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more general risk of harm.*
> >
> > *34. Reference is made, more generally, to a 'threat ... to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.*
> >
> > *35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, by the degree of indiscriminate violence characterising the armed conflict taking place - assessed by the competent national authorities before which an application for subsidiary protection is made, or by the court of a Member State to which a decision refusing such an application is referred - reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred to in Article 15(C) of the Directive."*
>
> *The Court, at paragraph 38 of its judgment, noted that the harm defined in Article 15(a) and (b) "requires a clear degree of individualisation".*
>
> *Article 2 (e) of the Qualification Directive prescribes eligibility for subsidiary protection. In addition to demonstrating a real risk of suffering serious harm (as defined in Article 15) the applicant must establish that he or she "is unable, or,*

owing to such risk, unwilling to avail himself or herself of the protection of that country".

32. In the present case, the harm that the applicant claims to fear is from Nigerian state agents as a result of his alleged MASSOB activities. He stated that he was shot by state authorities in Nigeria and that he fears he will be killed if returned. The harm claimed is clearly individual to him. Since the serious harm which the applicant allegedly fears emanates from State agents, this is not a situation where he will be able to avail of the protection of the Nigerian authorities. The applicant, therefore, is someone whose claim, if accepted, does come within the ambit of Article 15(b). While it is not for this court to determine the substantive issue, it is clear that the facts of this case, as alleged, are such as to require the Minister to give full consideration to the Article 15(b) claim and to provide adequate reasons for whatever decision he takes. As the CJEU observed in *M.M. v. Minister for Justice, Equality and Law Reform* (C-277/11):-

> *"87. The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely...*
>
> *88. That right also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision..."*

33. In this case the Minister, by omitting to address the central tenet of the applicant's case, failed in his obligation "*to pay due attention to the observations thus submitted*".

34. Despite having failed to consider the central aspect of the applicant's case, the Minister nevertheless found that there were no substantial grounds for concluding that the applicant would be at risk of serious harm in the nature of "*torture or inhuman or degrading treatment*" if returned to Nigeria. The Minister reached this conclusion without explaining his rationale or providing reasons. I am of opinion that this was in breach of the principle enunciated by Murray C.J. in *Meadows v. Minister for Justice* [2010] 2 IR 701, at paras. 93-95 of his judgment, where he stated:-

> *"93. An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and context.*
>
> *94. Unless that is so then the constitutional right to access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.*
>
> *95. In my view the decision of the first respondent in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced."*

35. Because the Minister's subsidiary protection decision (i) fails to consider the applicant's Article 15(b) claim at all, and (ii) proceeds to reject it without giving reasons, the decision cannot be allowed to stand and must, accordingly, be quashed.

Credibility Findings and Documentary Evidence

36. The applicant took issue with the Minister's credibility findings as set out in the subsidiary protection report. These findings were based entirely on those of the RAT. Under the heading *"(vii) the applicant's credibility and whether the benefit of the doubt should be given (Reg 5(3))"* the report states, with reference to the RAT decision:-

> *"In relation to the applicant's credibility, the member of the Tribunal concluded:*
>
> *'I have considered all of the documentation, country of origin information, written submissions, submissions, grounds of appeal and case law relied on in respect of this applicant's claim. This information does not assist the applicant in circumstances where his credibility is found wanting to such a degree that the very basis of his claim is not believed.'*
>
> *Because of the doubt surrounding his credibility, the applicant does not warrant the benefit of the doubt."*

37. Counsel for the applicant submitted that in light of the judgment of Hogan J. in *M.M. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 9, it was inadequate to simply state that the applicant was not credible and to blindly follow the findings of the RAT.

38. In reply, the respondent submitted that the adverse credibility findings at the asylum stage had never been the subject of judicial review. He added that while the subsidiary protection report refers to these findings and takes the view that the applicant does not warrant the benefit of the doubt, nothing actually turned on that finding. The respondent submitted that the issue of credibility was not relevant to the Minister's consideration of the Article 15(b) category of serious harm. The respondent stated that the credibility issue did not impact on the torture or inhuman and degrading treatment or punishment assessment. Counsel for the respondent further submitted that the applicant had not shown how the adverse credibility finding had affected the Minister's consideration of the subsidiary protection application.

39. In *E. D-N &Ors. v. Minister for Justice and Equality* [2013] IEHC 447, Mac Eochaidh J. was confronted with a situation where the Minister's assessment of the applicant's credibility for the purposes of a subsidiary protection application was based entirely on the RAT's adverse credibility findings. In considering this issue, Mac Eochaidh J. accepted that he was bound by *M.M*. He then held as follows at para. 36 of his decision:-

> *"It is my view that this is a case which is on 'all fours' with the M.M. decision, where Hogan J. states:*
>
> > *"46. In these circumstances, in the light of the guidance given by the Court of Justice on the reference, I must hold that the Minister failed to afford the applicant and effective hearing at subsidiary protection stage, precisely because he relied completely on the adverse credibility findings which had been made by the Tribunal…and because he made no independent and separate adjudication on these claims.*
> >
> > *47. In order for the hearing before the Minister to be effective in the sense understood by the Court of Justice in such circumstances, such a hearing would, at a minimum, involve a procedure whereby (i) the applicant was invited to comment on any adverse credibility findings made by the Refugee Appeals Tribunal; (ii) the applicant was given a completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection and*

(iii) involve a completely fresh assessment of the applicant's credibility in circumstances where the mere fact that the Tribunal had ruled adversely to this question would not in itself suffice and would not even be directly relevant to this fresh credibility assessment."

40. The learned judge concluded at para. 37:

> *Adopting the same approach as Hogan J., I find that that the Minister failed to afford the applicant an effective hearing at the subsidiary protection stage. There was no independent and separate adjudication on the applicant's claims because the Minister relied completely on the adverse credibility findings which were made by the Tribunal. Further, it is the court's view that the Minister's findings in respect of the credibility of the applicant cannot be severed from his findings in relation to state protection and internal relocation in this instance so as to rectify the perceived flaw in the decision making process. For these reasons, I hold that the decision of the Minister must be quashed. In view of that finding it is unnecessary to address the other grounds of complaint advanced ably by counsel for the applicant."*

41. I am satisfied that in relying completely on the RAT's negative credibility findings in respect of the applicant, and in failing to carry out its own independent assessment of the applicant's claims, the Minister did not afford the applicant an effective hearing at subsidiary protection stage. For this reason, the decision of the Minister cannot stand.

42. With regard to the Minister's evaluation of the documentary evidence, the applicant submitted that it made no sense for the Minister to apply Reg. 5(3), which he purports to have done when assessing the applicant's credibility, without reference to the particular parts of the applicant's claim not supported by documentary evidence. The applicant stated thatthe subsidiary protection decisiondoes not make any reference to the documentation that the applicant submitted to ORAC and the RAT. This included a MASSOB identity card, as well as corroborating evidence regarding the applicant's identity, his career, his travel, and his family. The applicant said that the Minister failed to acknowledge that the medical evidence he had submitted supported his account of having been shot.

43. The applicant submitted that there had been a complete failure by the decision maker to consider the representations made and to arrive at a reasoned decision on foot thereof, and also to apply the rules for assessment of applications under the European Communities (Eligibility for Protection) Regulations 2006.

44. In support of his submission, the applicant referred the court to the judgment of Mac Eochaidh J. in *Barua v. Minister for Justice and Equality* [2012] IEHC 456, where the learned judge stated as follows:-

> *"20. Section 8 of the Subsidiary Protection decision is entitled 'applicant's credibility and whether benefit of doubt should be given (Reg. 5(3))'. The author then proceeds to repeat some of the findings of the Refugee Appeals Tribunal concerning the lack of credibility of the applicant. It is not at all clear to me in what way such assessment is related to Regulation 5(3) which is cast as follows:*
>
> > *"Where aspects of the protection applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met …"*
>
> *Regulation 5(3) appears to be addressed to circumstances where part of the applicant's story is not supported by documentary evidence. At no stage does the author attempt to identify which part of the applicant's story is unsupported by documentary evidence, and having done so, how the credibility of the applicant's tale is then to be assessed. It is clear to me that such part of the report which is said to address the requirements of Regulation 5(3) fails so to do. This failure is closely related to the principal complaint- indeed, the only complaint - in respect of which the applicant was granted leave to seek judicial review. That complaint, simply put, is that there was a failure by the decision maker to address all of the documents which have been submitted to the Minister's officials in respect of the claim for subsidiary protection. It is recalled that the same suite of documentation accompanied the two-stage asylum application and the subsidiary protection application, together with the leave to remain application. It is a startling feature of this case that this documentation was not referenced, even casually, by the decision maker. Not every document submitted needs separate and microscopic examination. However, in a case such as this, where the documentary evidence is apparently corroborative of the applicant's story, this is an issue which the decision maker ought to address."*

45. Mac Eochaidh J. went on to hold at paras. 26-29 of his judgment:

> *"26. I find that if the subsidiary protection decision maker decided that the documentation at issue was tainted then she should have said so. Merely stating that, "[a]ll documents submitted and referred to have been read and given consideration" or quoting passages from country of origin information relating to forged documents is not enough to communicate such a view.*
>
> *27. As noted above, if documents which are prima facie corroborative of an applicant's account of relevant events are to be discounted, dismissed or rejected, or somehow found not to have corroborative effect, it is incumbent on the decision maker to explain why. There maybe overwhelming reasons, unrelated to the documentation, to reject the credibility of an applicant but if this is so, then the decision maker should say that and should clearly state the basis on which documentation which seemingly supports the applicant's story is discounted , rejected or dismissed. An objective outsider, such as this court, is left guessing why the applicant's documents submitted in support of the claim did not appear to have that effect. The references in the impugned decision to the prevalence of forged and fraudulently obtained documents in Bangladesh leads one to conclude that this is what the decision makers actually believed of some or maybe all of the applicant's supporting papers. That is a matter which ought to have been put to the applicant, or at the very least, an express finding in that regard should have been made and the basis of that finding should have been stated. Documents which prima facie support the applicant's story deserve comment and this is especially so when marginal credibility findings are relied upon by a decision maker to dismiss an applicant's story and refuse protection. (I note that the Tribunal stated that the applicant was fleeing prosecution, not persecution. Such a finding implies that the Tribunal accepted the authenticity of certain documents relating to activities of the courts and the police, but one is left guessing as to what the references to forgeries were about).*
>
> *28. Statutory rules and case law direct the manner in which documents must be treated: see Regulation 5 (1) (b) of the European Communities (Eligibility for Protection) Regulations 2006. As for case law, in IR v. Minister for Justice, Equality and Law Reform [2009] IEHC 353, paragraph 11, Cooke J lays out ten principles for the treatment of evidence which*

goes to credibility. The ninth principle reads as follows:

> *"Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated."*

The tenth principle states,

> *"Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addressee, and the Court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached."*

29. It is clear that the decision maker did not follow these principles. The decision furnished by the respondent did not allude to any reasons for the absence of weight attributed to the documentation furnished by the applicant. The decision does not explain why the documentation's corroborative effect was dismissed, discounted or rejected."

46. In light of Mac Eochaidh J's judgment in *Barua*, it is clear that the decision maker must specify what elements of the applicant's claim are supported by documentation and what elements are not. It is also clear that the decision maker is obliged to give reasons as to why documentation corroborative of an applicant's account was discounted, dismissed or rejected. In failing to do so, it seems to me that the Minister fell short of the requisite standard and that this constitutes a further deficiency in the subsidiary protection report upon which it must be quashed.

Deportation order

47. The applicant argues that in order for the deportation order to be valid in circumstances where an applicant has made a subsidiary protection application, the Minister must have made a valid subsidiary protection decision. I am satisfied that this submission is correct. In his judgment *A.A. [Iraq] v. Minister for Justice, Equality and Law Reform* [2012] IEHC 222, Cooke J. succinctly stated that "*the lawfulness of a deportation order is dependent upon an application for subsidiary protection having been validly rejected before the deportation order is made*."

48. Accordingly, as I have determined that the subsidiary protection decision was not validly made and must be struck down, and remitted to the Minister for reconsideration, it follows that the deportation order in respect of the applicant cannot be permitted to stand. In these circumstances, it is appropriate to quash the deportation order and remit the issue to the Minister for reconsideration along with the subsidiary protection decision.

Conclusion

49. For the reasons set out above, I will make an order quashing the Minister's subsidiary protection decision in respect of the applicant, dated 11th January, 2010, and remit the matter for fresh consideration. The deportation order in respect of the applicant, dated 19thFebruary, 2010, will also be quashed.