Neutral Citation Number: [2009] IEHC 529

THE HIGH COURT

JUDICIAL REVIEW

2008 1215 JR

BETWEEN/

M. S. T. AND J. T. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND M. S. T.)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY & LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 4th day of December, 2009.

1. By order of Finlay Geoghegan J. of 19th November, 2008, leave was granted to the applicants to bring the present application for, *inter alia*, an order of *certiorari* by way of judicial review, to quash the decision of the respondent Minister made on 15th September, 2008, refusing their application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations").

2. The applicants are mother and daughter and are ethnic Serbs who come from Croatia. They arrived in the State in September, 2004 and applied for asylum. Their passage through the asylum process has been somewhat complex and protracted but can be summarised as follows.

3. The first named applicant was born in what was then Yugoslavia on 30th September, 1955. In 1991 she went to Switzerland where she lived until 2003. In 1992 she married but claims that she was badly treated by her husband and that the marriage ended in 1994.

4. The second named applicant was born to the first named applicant in 1997 in another relationship. To avoid continuing harassment of herself and her daughter by her husband, the first named applicant returned to Croatia in 2003 to the house where her mother lived. 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.

5. In a section 13 report dated 11th April, 2005, the Refugee Applications Commissioner considered that the applicants had not established a well founded fear of persecution if returned to Croatia given that the designation of Croatia as a safe country created a presumption against persons being considered refugees from that State. (By order of 15th November, 2004, made under s. 12 (4) of the Refugee Act 1996, (as amended) the Minister had designated Croatia to be a safe country.)

6. While acknowledging that events in Yugoslavia had left a legacy of bitterness between Serbs and Croats leading to harassment and discrimination on both sides, the s. 13 report found that this could not automatically be considered to amount to persecution in the Convention sense. As the first named applicant had only once reported the incidents to the police, it could not be considered that there was an absence of available State protection.

7. That report and its negative recommendation by the Commissioner were appealed to the Refugee Appeals Tribunal. A first appeal decision of 27th July, 2005, rejected the appeal but was then withdrawn and the appeal was resubmitted to a different Tribunal member who issued a further decision of rejection on 28th October, 2005. That too, was then withdrawn. A further decision of the Tribunal of 29th March, 2006, rejected the appeal and reaffirmed the negative recommendation of the Commissioner.

8. Following that rejection, by letter of 25th April, 2006, the Minister advised the applicants of his proposal to make a deportation order. The letter outlined the options open to the applicants including that of making representations to be permitted to remain temporarily in the State. Deportation orders were made in respect of the applicants on 28th June, 2006. An application was then made under s. 3 (11) of the 1999 Act to have those orders revoked. Fresh representations were made and additional country of origin information documents were submitted in support of the application. In August 2006 an attempt was made to introduce a new asylum application but that was refused.

9. On 23rd November, 2006, the applicant's solicitors wrote applying for subsidiary protection for them under the 2006 Regulations and enclosed the relevant forms together with country of origin information documents and medical reports.

10. By letter of 14th March, 2007, the Minister rejected the application upon the grounds that the 2006 Regulations had come into operation on 10th October 2006 and did not apply to cases where deportation orders had already been made prior to that date. This decision was challenged by way of judicial review. That proceeding was compromised on terms under which fresh representations were invited from the applicants in support of the subsidiary protection application which the Minister undertook to consider. In response two further medical reports, amongst other documents, were

furnished. An additional medical report from a Ray Clarke dated 21st January, 2008 on the second named applicant was submitted on 28th January, 2008.

11. By letter of 14th March, 2008, the Minister exercised his discretion under Regulation 4 (2) of the 2006 Regulations to permit the application for subsidiary protection to proceed.

12. By letter of 15th September, 2008, the Minister refused the application for subsidiary protection and with his letter he furnished by way of statement of his reasons for his decision, a copy of the analysis note on the application made within the Department. This is the "Contested Decision" now sought to be quashed.

13. Leave to apply to quash the Contested Decision has been granted on the basis of seven grounds originally proposed and which can be paraphrased in order to focus better the precise issues of illegality now raised as follows:

> (1) Breach of Regulation 5 (1) (b) of the 2006 Regulations in the failure of have regard in assessing the facts of the case to the medical evidence and reports and particularly to the report of Ray Clarke of 21st January, 2008;
>
> (2) Breach of Regulation 5 (1) (c) in failing to have regard to the particular circumstances of the second named applicant as a minor and victim of past assault and serious harm in the light of the medical evidence;
>
> (3) Breach of Regulation 5 (2) by failing to consider whether the evidence of previous serious harm was alone sufficient to warrant the grant of subsidiary protection;
>
> (4) Breach of Regulation 5 (1) (b) by failing to take account of country of origin information;
>
> (5) The conclusion as to the availability of State protection to the applicants from persecution is irrational, unreasonable and perverse in the light of country of origin information as to the absence of an effective legal system for the detection, prosecution and punishment of acts of serious harm;
>
> (6) Extraneous and irrelevant factors were considered and the Minister misunderstood or misconstrued the application; and
>
> (7) The appropriate level of scrutiny was not exercised.

14. While the grounds for leave can be thus paraphrased, it is fair to say that the central thrust of the case as argued to the Court has turned upon the interpretation of Regulation 5 (2) to the effect that "compelling reasons arising out of previous … serious harm alone may … warrant a determination that the applicant is eligible for protection" combined with the alleged failure of the Minister as a "protection decision maker" (see Regulation 3 (1) (d)) to consider and investigate information given by the first named applicant as recorded in a psychiatric report of Ray Clarke on 21st January, 2008, relating to a break-in at the applicant's house at night by three masked men. It is submitted that this statement 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 is emphasised that while other medical reports and documentation submitted had been itemised as considered in the analysis note of the Contested Decision, the report of 21st January, 2008 is nowhere referred to in the Minister's file.

15. In assessing facts and circumstances a "protection decision maker" is required by Regulation 5 (1) to take into account a number of matters including:

> "(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or maybe subject to persecution or serious harm; and
>
> (c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm…"

16. The application for subsidiary protection had been made, as already mentioned, by the applicant's solicitors by letter of 23rd November, 2006. With that letter they submitted a body of country of origin information and further documents. The latter included reports of Dr. Helen Greally of 30th June, 2006 on both mother and daughter, a letter from the Health Service Executive relating to the first named applicant and a psychiatric report of Dr. Ann Doherty of 9th November, 2006, on the mother. The reports of Dr. Greally record the accounts given by J. of the treatment she received in school and of the treatment which both received at the hands of neighbours during their period of living in Croatia. The report on J. records:

> "J. is an eight year old child who lived in Croatia with her mother for a period of ten or eleven months. She appears to have been significantly traumatised by this experience and her experience with her classmates will give significant cause for concern. ... The changes in behaviour as described by Ms. T. and J. and confirmed by J. herself, indicates that she suffers from extreme trauma due to her experience in school. ... In view of this it is the view of the writer that J. is unable to sustain being returned to Croatia at this time and serious consideration should be given, in terms of protecting her psychological welfare, that she should be allowed to remain living in Ireland."

17. The psychological report of Dr. Ray Clarke was furnished to the Minister under cover of a letter of 25th January, 2008 in which it was said "having regard to the contents of the report there are clearly compelling reasons arising from our clients current mental health condition, her status as a minor and the serious harm she has previously suffered in Croatia for granting her subsidiary protection".

18. In this detailed report extending over some fifteen pages, Dr. Clarke records his interviewing of the first named

applicant. The important passage upon which reliance is now placed as evidence of an incident of previous serious harm is as follows:

> "The second incident was a break-in into their house during the night time by three men in masks, carrying weapons – one a gun, who threatened Ms. T.'s life and demanded money. They reportedly stole nothing whilst breaking much of the furniture in the house and shouting names at Mrs. T. which apart from identifying her ethnic background and what might happen to her as a result, were obscenely reductive in form and content. Mrs. T. reported that during this terrifying ordeal that J. was screaming, crying and in a foetal position at times or kneeling on the floor. After the event they stayed at home for long periods of time out of fear and that J. clung to her and cried on a regular basis and developed eneuresis and was always fearful. These responses were reinforced by less traumatic, but worrying events that took place every now and then."

19. The central submission made to the Court on the basis of this report is as follows. This account of the "second incident" of a night time break-in to the house by armed men constituted evidence of previous serious harm for the purpose of Regulation 5 (2). There was therefore a duty on the Minister to consider it as such. That fact, combined with the report on the medical condition of the applicants and on J. in particular, constituted "compelling reasons" warranting a determination that they were both eligible for protection but which the Minister has failed to consider.

20. This submission raises, in effect, a series of issues which could be stated in question form and addressed as follows:

> (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"?
>
> (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?
>
> (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
>
> (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?

The interpretation of Regulation 5 (2)

21. The 2006 Regulations were made on 6th October, 2006 for the express purpose of giving effect to Council Directive No. 2004/83/EC ("The Qualifications Directive") and were made in exercise of the power conferred by s. 3 of the European Communities Act 1972.

22. The Qualifications Directive was adopted, as its title indicates, for the purpose of laying down for the Member States:

> "…minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted."

Its minimum standards apply both for the purpose of identifying persons entitled to be declared to be refugees under the Geneva Convention and for the purpose of the complementary form of international protection to be called "subsidiary protection status".

23. While the common standards required to be effected by the Member States are minimum standards, recital (8) and article 3 of the Qualifications Directive make it clear that the Member States are to remain free to introduce or maintain more favourable standards for determining who qualifies as a refugee or is eligible for subsidiary protection so long as those standards are compatible with the Directive.

The provisions of the Regulations

(For ease of readability, citations from the 2006 Regulations and from the Qualifications Directive set out hereunder omit quoting provisions not immediately relevant to the present case such as the references to persecution, refugee status, stateless persons and to regulations or articles not applicable in the present case.)

24. So far as concerns the present issue of interpretation of Regulation 5 (2) the following provisions of the 2006 Regulations are relevant:

> Regulation 2 (1) "A person eligible for subsidiary protection" means a person –
>
> (a) who is not a national of a Member State,
>
> (b) who does not qualify as a refugee,
>
> (c) in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in these regulations,
>
> (d) is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that

country;

"serious harm" consists of –

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

Regulation 5 (1) The following matters should be taken into account by a protection decision-maker for the purpose of making a protection decision:

(a) all relevant facts as they relate to the country of origin as the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

Regulation 5 (2) The fact that a protection applicant has already been subject to …. serious harm, or to direct threats of …. such harm, shall be regarded as a serious indication of the applicants well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such … serious harm will not be repeated, but compelling reasons arising out of previous … serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.

25. Similarly, the corresponding provisions of the Qualifications Directive which are relevant are as follows:

Article 2 (e) "person eligible for subsidiary protection" means a third country national … who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, … would face a real risk of suffering serious harm as defined in article 15… and who is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;"

"Assessment of facts and circumstances"

Article 4.3

"The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) All relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) The relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be the subject to persecution or serious harm;

(c) The individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;"

Article 4.4

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

Article 15 defines serious harm as consisting of:

(a) Omissis

(b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;

(c) Omissis

26. As is immediately apparent, Regulation 5(2) has the object and effect of transposing article 4.4 of the Directive but does so with the addition of the words upon which the applicants now rely (hereafter referred to as 'the additional wording",) and which are not used in the Directive namely, "… but compelling reasons arising out of previous … serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

27. In the ordinary course, where a statutory instrument has been adopted on the basis of s. 3 of the Act of 1972 in order to transpose a Community directive, the Court must presume, in the absence of explicit wording to contrary effect, that the legislative purpose is to give full and accurate effect to the provisions of the Community measure and no more. Thus, the 2006 Regulations fall to be construed in the light of the wording and objective of the Community measure. Where a regulation fails to give full or correct effect to the provision of the Community measure, it may be necessary for a court in an appropriate case to have regard to the possible direct effectiveness of the Community provision where the transposition period has expired and when the State or a State agency purports to rely as against a litigant upon the defective or incomplete domestic provision.

28. 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:

(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.

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.

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.

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".

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". (See para. 23 above.) 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.

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.

34. The Court's attention has been drawn to the judgment of Charleton J. in *N. v. M.J.E.L.R.* (High Court, 24th April, 2008). The Court would agree with the learned judge in the view he expressed that this additional wording does not operate so as to create a distinct new criterion for entitlement to subsidiary protection over and above that contained in article 4.4 of the Directive. Eligibility remains dependent upon it being established that there is a real risk upon return of suffering serious harm as defined. Regulation 5 is concerned with how a protection decision maker assesses the reality of the risk. Regulation 5(2) tells the decision maker that the fact of previous serious harms suffered, when proven, is a serious indication that the risk is real in such a case and if that harm gives rise to compelling reasons for considering that international protection is necessary, that fact alone may be enough even if it is possible that the same fact may not be repeated. The additional wording falls, as indicated above, to be regarded as facilitating the application of the basic provision contained in article 4.4 and elsewhere in Regulation 5 (2) by clarifying how evidence of facts and circumstances relating to incidents of previous serious harm may be assessed. It is purely facultative: "may nevertheless warrant …". The words to not give rise to a new entitlement as such. They merely allow the protection decision-maker the facility in a case of compelling reasons, to determine eligibility as established without being obliged to be fully satisfied that the harm runs a risk of being repeated.

35. The question then arises as to whether the Minister was lawfully entitled in exercising power under s. 3 of the 1972 Act to incorporate such a facility in Regulation 5 (2) when transposing article 4.4? The transposition into national law was clearly "necessitated" in the sense of article 29.4.10 of the Constitution and the Minster was clearly entitled to adopt S.I. 518 of 2006 for the purpose of giving it effect by exercising the power conferred by section 3 (1) of the Act.

36. Insofar as the additional wording can be said to modify the criterion of the earlier part of para. (2) of the Regulation, it can clearly be construed as adding to Article 4.4 in a way which is in ease of a protection applicant and, in that sense, may be considered a more "favourable standard for determining eligibility for protection" and as thus being compatible with Community law by virtue of Article 3 of the Directive.

37. So far as concerns, on the other hand, national law, it is to be noted that s. 3 (2) of the 1972 Act provides that regulations may contain "such incidental, supplementary and consequential provisions as appear to the Minister making the Regulations to be necessary for the purpose of the regulations …." Given that the additional wording has the limited effect, as indicated above, of facilitating the interpretation and application of the transposed provision of Article 4.4 in individual cases where previous harm gives rise to compelling reasons but in which there might be doubt as to whether the criterion of risk of repetition is met, the Court considers that the additional wording constitutes an incidental and supplemental provision to the transposition.

38. This is a case of transposition of a directive and does not involve (at least in this particular respect) any amendment of pre-existing provisions of domestic law. At its most expansive interpretation, the additional wording merely entitles the

Minister to grant subsidiary protection to individual applicants in cases where there are compelling reasons arising out of incidents of previous serious harm suffered, even though he may not be satisfied that such harm will be repeated if the applicant is returned to the country of origin. While it may be true that the additional wording is not "necessary" for the purpose of transposition as such in the sense that transposition would have been deficient without it, the Court does not consider that the word "necessary" in this context falls to be construed in the narrow sense of being "imperatively required or mandatory" in the way in which the word "necessitated" in article 29.4.10 of the Constitution has been construed by the Supreme Court. (See *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 at 352).

39. In the Court's judgment s. 3 (2) of the Act of 1972 should be construed as allowing a Minister in transposing a directive to adopt incidental and supplementary provisions which are compatible with the wording and objective of a directive, in order to clarify the terms employed in the domestic law and to facilitate the effective application of the measure in practice. The additional wording is, in that sense "necessary" for that purpose in facilitating the operation of the Regulations. In this instance the effect of the additional wording is not such as would, in any event, alter or extend existing powers available to the Minister. Independently of the 2006 Regulations, the Minister has powers under the Immigration Acts to grant temporary leave to a person to remain in the State on humanitarian grounds and it would clearly be competent for him to do so in a case of an applicant where there are compelling reasons arising from previous serious harm he or she had suffered for not requiring the applicant to return to the locality of that suffering.

40. There remain then the further questions as to whether there was in the information available to the Minister on the application for subsidiary protection, material which put him on enquiry as to whether Regulation 5 (2) as so construed was applicable in this case and whether the suffering experienced including the "second incident" recorded in the medical report of Dr. Clarke could in any event qualify as "previous serious harm" so as to require it to be considered on that basis.

41. Clearly, no purpose would be served by quashing the Minister's refusal with a view to having him reconsider the application if the evidence relied upon is in any event incapable of constituting proof of the fact of previous serious harm.

42. It is accepted that, for this purpose, the claim depends upon the evidence amounting to proof of "inhuman or degrading treatment" within the meaning of the definition of "serious harm". (See para. 23 above.) That expression is also employed in article 3 of the European Convention on Human Rights and, as such, has been the subject of numerous judgments of the Strasbourg Court, many of which have been opened to this Court in argument. (See, in particular, *Pretty v. U.K.* [1002] E.C.H.R. 427; *Tyrer v. U.K.* [1978] E.C.H.R. 1; *Cruz Varas v. Sweden* [1991] E.H.R.R. 1.)

43. The following basic characteristics emerge from this case law as to what can constitute inhuman or degrading treatment for the purposes of article 3:

- It is treatment that humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity;

- it arouses fear, anguish or inferiority capable of breaking an individual's morale and physical resistance;

- it must attain a minimum level of severity but this level is relative and depends on the circumstances of the case including the treatment duration, its physical and mental effects and on the sex, age and state of health of the victim;

- it is also relevant to consider whether the objective of the treatment was to humiliate and debase the victim although the absence of such a purpose does not mean a treatment fails to come within the prohibition.

44. The events relied upon as constituting proof of having suffered previous inhuman or degrading treatment occurred in the period following the applicants' return to Croatia from Switzerland in November 2003 until they left to come to Ireland in September 2004. The applicant described the hatred that existed between Croats and Serbs upon her return. She said:

> "We were mistreated, mocked and they smashed the windows of the apartment twice. As the school year was coming close, I had an indescribable fear for my daughter. I had a feeling things wouldn't be good. She has a Serb name. On the first day at school, they broke her nose and beat her up. The next days they tore her books, threw her bag and tormented her. Everyday when she returns from school she cries and is afraid. Together with my daughter I could not bear the stress and the fear."

She said she did not know who had carried out the attacks on her house as they happened during the night. She reported the matter to the police on one occasion but nothing happened and she feared more serious reprisals if she persisted in making complaints.

45. The same events are recorded in the interviews conducted by the medical practitioners mentioned above and particularly in the reports of the clinical psychologist Dr. Grealy. While these reports are primarily concerned with describing and assessing the consequences of the events for the mental health of both mother and daughter, the one place in which further factual material is added is that of the "second incident" recounted to Dr. Clarke in the report mentioned at paras. 17-18 above.

46. There can be no doubt having regard to the contents of these reports that the experiences of the applicants in Croatia during that period of ten months were extremely frightening and stressful and had continuing consequences for their wellbeing and mental health thereafter. It is conceivable, therefore, that the symptoms described in these medical reports and the condition of the mental health of both applicants at the relevant time could be regarded as constituting "compelling reasons" within the sense of regulation 5 (2) on the basis for humanitarian considerations for temporary leave to remain in the State should that issue arise. That, however, is not the consideration that arises now in respect of this reliance upon these facts as constituting proof of "previous serious harm" in the form of inhuman and degrading treatment.

47. As has already been pointed out, this additional detail in relation to the "second incident" was entirely new when it appeared in the report of Dr. Clarke forwarded to the Minister under cover of the letter of 25th January, 2008. That description had not been given by the applicant at any earlier stage and did not form part of the material relied upon in the application for subsidiary protection when initially made on 23rd November, 2006. In that application reliance was

placed upon the events as originally described by the mother, the racial hatred, the attacks on the house, the taunting and name-calling in the street, the bullying of the daughter in school and her having suffered a broken nose. The main thrust of the claim as made in the application was that the incidents of discrimination and racial attacks on the apartment indicated that Croatia was not a safe country for the applicants and that they would be subjected to treatment amounting to serious harm by reason of their Serbian ethnicity if forced to return to Croatia. In addition the claim was made that "it is clear that their forced return to Croatia would constitute of itself inhuman or degrading treatment or torture of our clients."

48. It is, in effect, the claim thus made based upon that description of the incidents of previous serious harm which is analysed in the detailed note upon which the Minister's refusal decision was based. In a careful analysis set out over some six pages, the note takes into account the evidence relied upon in the light of country of origin information relating to prevailing conditions in Croatia including the fact that, while prosecutions have taken place, ethnically motivated attacks on Serbs were confirmed to be continuing. Regard is also had to the case law and particularly to the then recent judgment in the N case referred to at para. 34, above. The analysis concludes:

> "It is submitted that the ill-treatment alleged by the applicants has not amounted to torture and inhuman or degrading treatment, however undesirable the alleged ill-treatment. It is further submitted that the foregoing country of origin information illustrates that state protection is available in Croatia."

The writer further concludes:

> "I have considered this information and find that on the basis of the applicant's personal circumstances, there is nothing to suggest that the acts which the applicant has been or could be exposed to would amount to serious harm."

49. It is therefore clear that the Minister's refusal decision is based upon an appraisal of the events relied upon by the applicant (other than the "second incident" in the Clarke report) and that a conclusion is reached to the effect that: i) the historic incidents did not constitute previous serious harm; and, ii) that the return of the applicants to Croatia in the circumstances now prevailing and in the light of their personal circumstances and medical condition, would not itself expose them to renewed or further serious harm. It is also clear that this conclusion was reached on the basis that serious harm included inhuman or degrading treatment.

50. Having regard to the case law as to the essential nature of "inhuman or degrading treatment" for this purpose, the Court is satisfied that this conclusion, as made on that limited basis by the Minister could not be upset as being unsound or unlawful. While the attacks on the house and window breaking, the expressions of racial hatred, the bullying of J. in school and the attack upon her which broke her nose, are all undoubtedly frightening, stressful, painful and ugly, it could not, in the Court's judgment, 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.

51. It does appear to be the case, however, that the analysis made as the basis for the refusal decision was made by reference only to the factual information contained in the original application for subsidiary protection as supplemented by that drawn from the documentation relating to the proceedings before the Commissioner and the Tribunal. Although, on page 4 of the note, specific reference is made in the medical reports and correspondence from the HSE, no specific mention is made of the report of 21st January, 2008 of Dr. Ray Clarke as furnished with the latter of 25th January, 2008. Dr. Clarke's earlier letter of 18th December, 2007 is listed and reference is also made to subsequent correspondence from the HSE which included a further report of Dr. Lawlor. While the note confirms that "these reports had been read and considered" and this would normally give rise to a presumption on the part of the Court that the report of Dr. Clarke from January, 2008 had been included in that consideration, it is perhaps striking that in this case there is then no mention of the "second incident" when it constitutes a significant addition to the information and its contents are explicitly referred to in the letter of 25th January 2008 as being relevant to "compelling reasons arising from …. the serious harm she has previously suffered in Croatia". Having regard to the manner in which that letter draws attention to the content of the report; to the potential significance of the nature of the "second incident" and also to the manner in which the account of the interviews explains why this detail may not have been offered previously by the mother, this Court considers that this is, exceptionally, an instance where the decision maker ought to have given consideration to this additional factual information even though it is contained in a medical report rather than in a statement of evidence.

52. It is clear that the "second incident" is at least potentially more significant and sinister in character from the point of view of assessing whether there has been "inhuman and degrading treatment". 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.

55. The Court will therefore grant an order of *certiorari* quashing the decision to refuse subsidiary protection as notified by letter of 15th September, 2008 upon the basis of grounds D and E of the amended statement of grounds dated 25th November, 2008.

56. In those circumstances, while it is not strictly necessary to rule upon the other grounds raised it may be desirable in order to facilitate the Minister's reconsideration of the application and to avoid any future litigation, to state that the Court does not consider the other grounds upon which leave was granted have been substantiated. Ground A is of a general character and is effectively replaced by the more particular grounds which follow. Save insofar as the Court has found that the "second incident" was not considered as part of the analysis of the alleged fact of previous serious harm, the Court does not consider that there has been an infringement of subparagraphs b) or c) of Regulation 5 (1) by a failure to adequately take into account relevant documentation or to consider the individual circumstances of the applicants. The Court does not find that there has been any irrational or perverse conclusion reached in relation to the conditions in Croatia for ethnic Serbs as alleged in ground F. Finally, contrary to the argument raised under the heading of ground G, the Court does not find that the decision considered extraneous or irrelevant factors or misunderstood or misconstrued the contents of the application for subsidiary protection or the submissions and arguments raised on foot of it. On the contrary, as already indicated, the Court considers that, subject only to the apparent failure to consider the significance of the "second incident", the analysis which led to the decision was detailed, careful and balanced in its assessment of the contents of the claim, the country of origin information the cited case law and the relevant statutory provisions.