NEUTRAL CITATION: [2012] IEHC 572

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2011 /923 J.R.

Between:

M.A. U-H. (PAKISTAN)

APPLICANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 28th day of June 2012

1. The applicant is a national of Pakistan and a member of the Ahmadiyya religion. His claim for asylum has been rejected and the Minister for Justice and Equality has refused his applications for subsidiary protection and for leave to remain and has made a deportation order against him. The applicant seeks leave to apply for orders of *certiorari* quashing (i) the Minister's decision under s. 17(1) of the Refugee Act 1996 to refuse him refugee status; (ii) the Minister's decision to refuse him subsidiary protection; and (iii) the Minister's decision to make a deportation order against him. He also seeks declaratory relief. The negative decisions of the Refugee Applications Commissioner and Refugee Appeals Tribunal were never challenged. The leave hearing took place on the 7th June 2012 in Court 26. Mr Gary O'Halloran B.L. appeared for the applicant and Ms Ann Hamett-O'Connor B.L. appeared for the respondents. There is an injunction in place restraining the deportation of the applicant pending the determination of the proceedings.

Background

2. The applicant carries a passport which confirms his status as a member of the Ahmadi faith. It also contains a travel visa to India which predates his travel to Ireland on a valid student visa. The facts underlying his applications for protection are that before coming to Ireland he lived in the Punjab province of Pakistan with his family who are devoted followers of the Ahmadiyya religion. They have all suffered harassment and discrimination as a result of their religious beliefs. He himself encountered verbal and physical abuse when attending school and college and eventually was forced to leave and study at home. In his spare time he was active in mosque activities which included instructing the children in their community in the basics of their faith. As a result the local Sunni Mullah targeted him in his sermons saying he must convert.

3. The applicant recounted attacks from members of the Khatm-e-Nabuwwat. After one such attack he was refused medical treatment and when he complained of the attack to the police, they refused to register his complaints and instead showed him a copy of the blasphemy laws directed to the Ahmadis and other decreed non-Muslims. His father then made arrangements to get him a study visa for Ireland and he left Pakistan in March 2008.

He studied at a business school in Dublin but returned home in September 2008 when his mother fell ill. During that visit he suffered further abuse and received threats and he says that in October 2008 he was beaten up by a group of Khatm-e-Nabuwwat students whose mosque had been build adjacent to the Ahmadiyya mosque which he attended. He moved to the city of Rabwah, the headquarters of the Ahmadiyya community, where he stayed for ten days before returning to Ireland to resume his studies. He decided to apply for asylum a number of weeks later. Country of origin information (COI) reports relating to Pakistan confirm that the Ahmadis in Pakistan are considered to be blasphemers because they consider that they are Muslims. They are regularly attacked by fundamentalist sections of the mainstream and majority Sunni Muslim faith in Pakistan.

4. The asylum authorities rejected his claim, finding it implausible that he should have returned to visit his mother if he feared the persecution alleged and placing weight on his failure to apply for asylum as soon as practicable after arriving in Ireland. Doubts were expressed about the extent of his involvement with the Ahmaddiya community in Pakistan and his knowledge of the differences between the two sects of Ahmadis. However, the fact of being an Ahmadi was not specifically rejected. Because of his delay in applying for asylum, his appeal was determined on a documents only basis.

The Submissions

5. The applicant seeks leave on grounds 1 and 11 (unlawful delegation of ministerial duty), 8 (failure to provide an effective remedy), 12 (unconstitutionality of indefinite deportation order) and 15 (irrationality) of his statement of grounds.

(a) Irrationality

6. The applicant's primary argument is that the conclusions reached in the subsidiary protection and deportation decisions with regard to the availability of state protection are irrational in the light of the COI consulted and relied upon by the Minister. The applicant does not dispute that the COI indicates a functioning police force and judicial system in Pakistan but argues that the same COI indicates that they are not sympathetic to Ahmadiyya followers and indeed they uphold and apply the blasphemy laws and do not come to the aid of Ahmadi victims of religiously motivated attacks. Reliance is placed on the opinion of Advocate General Bot in *Federal Republic of Germany v Y (Cases C-71/11), Z (C-99/11)* delivered on 19th April 2012.

7. The respondents contend that Pakistan is an Islamic Republic which, in common with other Islamic countries, has introduced religious based laws consistent with the ethos and culture of the country. The majority of Muslims in Pakistan consider the beliefs of the Ahmadiyya to be blasphemous so it is the right of the Pakistani State to impose a blasphemy law. Notwithstanding these discriminatory laws, up to 4 million Ahmadis can and do practice their faith in Pakistan in many dozens of mosques. The COI shows that there is discrimination and bullying against the Ahmadiyya community and that they are subject to blasphemy laws which can carry the death penalty on conviction. However, COI also indicates that the death penalty has not been implemented since 2008 and

that efforts are being made to repeal the blasphemy laws and to provide compensation to those who suffer religiously-motivated violence. Many of the Ministries in government are being given to minorities and the work of NGOs is tolerated. The respondents rely on the decision of the High Court of England and Wales in *R (Saad Tariq aka Tariq Mehmood) v. Secretary of State for the Home Department* [2009] EWHC 1390 (Admin) in support of their proposition that only high profile Ahmadis are targeted in Pakistan. The respondents argue that most Ahmadis live without interference day to day and do not end up in jail for blasphemy. They practice and pass on their religion and convert others, if mostly in their homes. It is public practice of their faith that causes trouble. In their contention the applicant's asserted high profile was rejected by the Commissioner and the Tribunal. This, they argue, was the whole premise underpinning the episodes of persecution which the applicant claims catalysed his ultimate asylum application. He does not appear to have been disadvantaged in his education or in the practice of his religion in Pakistan; he even managed to obtain a degree. The Minister's decision could not be described as irrational based on the information before him.

(b) Delegation of Ministerial Duties (Deportation Order)

8. The applicant argues that the Minister is the sole person empowered to make a deportation order under s. 3 of the Immigration Act 1999 but he has unlawfully delegated that power to one of his civil servants. The applicant relies on the grant of certificate of leave to appeal in *L.A.T. & Others v. Minister for Justice and Equality* [2011] IEHC 404 (2nd November 2011). The applicant further argues that the pre-deportation decision on refoulement under s. 5 of the Refugee Act 1996 is a personal one restricted to the Minister, having regard to the decision of Murray C.J. in *Meadows v. The Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701. This is a matter on which leave was granted by Cooke J. in *Afolabi v. Minister for Justice and Equality* [2012] IEHC 192 (1ih May 2012).

9. The respondents stress that Hogan J. refused to grant leave in *L.A.T*. They rely on *F.L. v. Minister for Justice and Equality* [2012] IEHC 189 (10th May 2012) where Hogan J. considered and rejected arguments related to the comments of Murray C.J. in *Meadows*.

(c) Disproportionality (Deportation Order)

10. The applicant argues that s. 3 of the Immigration Act 1999 is unconstitutional because the indefinite duration of the deportation order has a disproportionate impact on the right to family life protected by Article 41 of the Constitution. A declaration of incompatibility with Article 8 of the European Convention on Human Rights (ECHR) is also sought. The applicant relies on *Sivsivadze & Others v. The Minister for Justice and Equality* [2012] IEHC 137 where Hogan J. granted leave on this issue.

11. The respondents rely on *Afolabi v. Minister for Justice and Equality* [2012] IEHC 192 (1ih May 2012) where Cooke J. addressed the *Sivsivadze* arguments in context.

(d) Effective Remedy (s. 17(1) decision)

12. The applicant argues that the Minister had no jurisdiction to refuse a grant of refugee status under s. 17(1) of the Refugee Act 1996 because he has been denied an opportunity of an effective remedy before the asylum authorities. The argument is that the Tribunal as constituted does not provide an effective remedy. This is the second of two questions which are the subject of a reference to the Court of Justice of the EU in the cases of *H.I.D. and B.A*. The applicant relies on *T.D. & Others v. The Minister for Justice and Equality* [2011] IEHC 37 where Hogan J. gave leave to challenge the Minister's decision under s. 17(1) together with the Tribunal decision and the deportation decisions.

13. In this regard the respondents rely on the decisions of Hogan J. in *P.M. v The Minister for Justice and Law Reform* [2011] IEHC 409 and *P.M. (Botswana) v Minister for Justice and Law Reform* (No.2) [2012] IEHC 34 where it was held that an applicant has access to an effective remedy via the application for judicial review procedure provided for in O. 84 RSC and that this is a question which has been fully clarified by a series of judicial decisions.

The Court's Assessment

14. The Court is of the opinion that substantial grounds have been established only in relation to the irrationality of the Minister's subsidiary protection and deportation decisions having regard to the COI that was before him. For the reasons set out below, it seems at a minimum arguable that no reasonable person having sight of that COI could have reached the conclusion that state protection would be available to an Ahmadi such as the applicant in Pakistan.

The Subsidiary Protection Decision

15. The Minister's agent who was considering the application for subsidiary protection should have had before him the entire asylum file including the COI submitted by the applicant to the Commissioner. This included a copy of ordinance XX of the Pakistani Criminal Code and more than twenty news articles from various sources relating to the persecution of Ahmadis in Pakistan. At the subsidiary protection stage the applicant also submitted that effective, meaningful protection would not be available to him in Pakistan and submitted articles on the ongoing persecution of Ahmadis including the names of those Ahmadis who had been murdered, imprisoned, prosecuted, abducted and attacked in 2009.

16. From the extracts quoted in the Minister's assessment of the applicant's claims for subsidiary protection and on refoulement it is clear that the civil servant preparing the reports consulted current COI additional to that submitted by the applicant. This included the Amnesty International *Report- Pakistan* dated May 2011 which stated that an informal moratorium on executions commenced in 2008 was continuing but some 8,000 remained on death row, and that while Pakistan ratified the ICCPR and UNCAT with sweeping reservations it had taken no steps to incorporate those treaties into domestic law. He also consulted the United States Commission on International Religious Freedom *(USCIRF) Annual Report 2011 -Pakistan* which refers to the blasphemy laws and states that severe penalties were added to the penal code under Articles 295B and C which are punishable by life imprisonment or the death penalty. He quoted the following:

> *"Blasphemy allegations, which are often false, have resulted in the lengthy detention of and occasional violence against, Christians, Ahmadis, Hindus, other religious minorities, and members of the Muslim majority community. In fact, according to interviews USCIRF staff conducted in Pakistan, more cases are brought under these provisions against Muslims than any other faith group. While no one has been executed under the blasphemy laws, these laws have created a climate of vigilantism. "*

17. The civil servant also noted that the USCIF report details how a bill reforming the blasphemy laws and removing the death penalty was tabled in November 2010 but the proposal was not supported and the parliamentarian who proposed it received death threats.[1]

He also consulted a *Freedom House Freedom in the World 2011- Pakistan* report dated July 2011 to the following effect:

> *"Pakistan is an Islamic republic, and there are numerous legal restrictions on religious freedom. Violations of blasphemy laws draw harsh sentences, including the death penalty, and injuring the "religious feelings" of individual citizens is prohibited Incidents in which police take bribes to file false blasphemy charges against Ahmadis, Christians, Hindus, and occasionally Muslims continue to occur, with several dozen cases reported each year. In November 2010, Aasia Bibi, a Christian woman, was sentenced to death in a blasphemy case that was condemned by both local and international rights groups; an appeal was pending at year's end No executions on blasphemy charges have been carried out to date, but the charges alone can lead to years of imprisonment, ill-treatment in custody, and extralegal persecution by religious extremists. For example, in July 2010, two brothers accused of blasphemy were killed by gunmen inside a courtroom. As reformers pressed for either repeal or amendment of the laws, on the grounds that they are discriminatory and frequently misapplied, religious hard-liners alleged that even questioning the laws themselves constituted an act of blasphemy. "*

18. The decision-maker concluded that, having regard to this COI, the applicant had given no reason why he would be sentenced to death for blasphemy and that the death penalty is in accordance with due process of law. It was found that, in light of the credibility findings made by the Commissioner and Tribunal, the applicant had not demonstrated that he was at risk of the death penalty or execution.

19. Going on to consider whether the applicant was at risk of torture, inhuman or degrading treatment, portions of the 2011 Freedom House report were quoted to indicate that NGOs are generally tolerated and allowed to publish critical material; that the penal code severely restricts the religious practice of Ahmadis, who comprise about 2.5 percent of the population, and they must effectively renounce their beliefs to vote or gain admission to educational institutions. Authorities occasionally confiscate or close Ahmadiyya publications and harass their staff and dozens of Ahmadis faced criminal charges under blasphemy or other discriminatory laws in 2010 (emphasis by the Court). The judiciary consists of civil and criminal courts and a special Sharia court for certain offences, with lower courts plagued with corruption, intimidation and a backlog of 1.5 million cases albeit that a new policy took effect in 2009 aiming to tackle those problem with some positive effects in 2009. The Minister's agent also quoted a passage from a UK Home Office OGN: Pakistan (August 2011) describing the operation and functioning of police forces in Pakistan.

20. It was concluded on the basis of this information that *"there is an established functioning police force in Pakistan to enforce the rule of law"* and that *State protection in Pakistan, is a viable option for the applicant, in the event that he seeks remedy there."* It was also stated that *"It has not been demonstrated that Pakistan is unable or unwilling to provide protection against the treatment allegedly suffered by the applicant"*. It was concluded that the applicant had not demonstrated that he was without protection in Pakistan.

The Deportation Decision

21. In his leave to remain application, the applicant quoted the following from an Amnesty International report on Pakistan (2009): *"After the new government announced that it would commute death sentences to life imprisonment, it executed at least 16 people; at least 36 were executed throughout the year"*; that *"The government failed to adequately protect religious minorities against widespread discrimination, harassment and targeted violence"*; that two Ahmadi men had been shot dead by unknown persons after a TV station aired a call to kill apostates and blasphemers and that no investigation was known to have been initiated; that 76 people were charged with blasphemy including 17 people charged under section 295C of the Penal Code which carries the death sentence for insulting the name of the prophet Muhammad; and that 16 Ahmadis were charged in Punjab for removing a poster that negatively depicted their religious leader (emphasis by the Court).

22. The deportation decision follows the same thread as in the subsidiary protection decision. While some of the extracts quoted from the 2011 OGN and the 2011 Freedom House report and the 2011 Human Rights Watch report on human rights abuses, they are not relevant to the treatment of Ahmadis. The US Department of State report on *International Religious Freedom Report 2010- Pakistan* is cited to support instances of attempts by the government to encourage religious tolerance in Pakistan. However the decision also cites from the Minority Rights Group International (MRGI) report on Pakistan that Ahmadis continue to face serious discrimination in all areas of life - they are unable to vote in elections because they are not considered Muslims and there were regular reports of violence against them in 2010, including attacks on mosques in Lahore.

23. The deportation decision also quotes large passages from the 2011 USCIF report referred to above, to the effect that *"Pakistan continues to be responsible for systematic, ongoing, and egregious violations of freedom of religion or belief"*; members of the ruling party were assassinated for their advocacy against the repressive blasphemy laws[2]; the laws have created *"an atmosphere of violence extremism and vigilantism"*; religiously-motivated violence is *"chronic"* and the authorities have not consistently brought perpetrators to justice. The passages quoted chronicle the efforts made in recent years to improve the situation of minorities but it concludes that *"discriminatory laws promulgated in previous decades and persistently enforced have fostered an atmosphere of religious intolerance and eroded the social and legal status of members of religious majorities"*. It also notes that in recent years, scores of Ahmadis have been murdered in religiously-motivated attacks; that the Ahmadis are subject to the most severe legal restrictions and officially-sanctioned discrimination; egregious acts of violence have been perpetrated against them; that anti-Ahmadi laws have helped create a permissible climate of vigilante violence; Ahmadis are prevented from engaging in the full practice of their faith and may face criminal charges for a range of religious practices including the use of religious terminology; Ahmadis are constitutionally considered non-Muslims and are restricting in building new houses of worship, holding public conferences or other gathering, and traveling to Saudi Arabia for religious purposes including the Hajj; in order to obtain a Pakistani national ID card or passport they must sign a religious affirmation denouncing the founder of their faith as a false prophet and they are disenfranchised from participating in elections at any level. This led the decision-maker to find that *"Country of origin information confirms that there is a functioning police force and judicial system in Pakistan and I am satisfied that State protection is available to [the applicant] in Pakistan. Accordingly, I am of the opinion that repatriating [the applicant] to Pakistan is not contrary to Section 5 of the Refugee Act 1996, as amended, in this instance."*

Analysis

24. The decision-maker may have been correct in finding that there is a functioning police force and judicial system in Pakistan but it is equally clear from the same reports that the police and the judiciary are not sympathetic to and do not protect Ahmadis who face criminal charges under the blasphemy laws which attract harsh sentences including, potentially, the death penalty. The 2011 OGN on which the Minister relied states at paragraph 2.3.3 that *"Pakistan has only about 350,000 police personnel for a population of 170 million and the mandated strength is rarely reached, especially in rural areas where most criminal activity occur" and that "Punjab, Pakistan's most populous province, has an 180,000-strong police force of which only 40,000 are permanently stationed in police stations"*. At paragraph 2.3.7 the OGN states that *"Police effectiveness varies greatly by district, ranging from reasonably good to*

ineffective " and that *"there are reports that security forces, including intelligence services, tortured and abused individuals in custody"* including 4,069 cases of torture by police of which 2,690 allegedly occurred in Punjab alone. At paragraph 2.3.8 it states that *"Frequent failure to punish abuses creates a climate of impunity. Police and prison officials frequently use the threat of abuse to extort money from prisoners and their families. "*With specific reference to police protection for Ahmadis the OGN states at paragraph 3.7.7:

> *"The authorities routinely used blasphemy laws to harass religious minorities and vulnerable Muslims and to settle personal scores or business rivalries. Authorities detained and convicted individuals on spurious charges. Judges and magistrates, seeking to avoid confrontation with or violence from extremists, often continued trials indefinitely. In several instances, the police have been complicit in harassment and the framing of false charges against Ahmadis, or stood by in the face of anti-Ahmadi violence."*

25. As this is a leave application, the Court does not propose to repeat the quantity of extracts which appear in the COI consulted by the Minister's agents. The COI outlines circumstances of reluctance and tardiness on the part of the police to even receive complaints of physical attacks on members of minority faiths. The COI submitted by the applicant together with the reports sourced and relied upon by the respondent supports the applicant's submission that Ahrnadis are subject to severe legal restrictions and officially sanctioned discrimination, and that the blasphemy laws have created a permissible climate for vigilante violence against minority faiths including the Ahrnadis from which the State does not afford any effective or meaningful protection.

26. The respondents' argument that international protection is not warranted because Ahrnadis do not face difficulties if they practice their faith in private is not compelling. The Court is more persuaded by the opinion of Advocate-General Bot in *Federal Republic of Germany v Y (C-71/11), Z (C-99/11)* of 19th April 2012 that the concept of religious freedom cannot be confined to private conscience to the exclusion of public manifestation of religion. Requiring persons to avoid persecution by refraining from practising their religion in public upon return to their country of origin is not compatible with human rights guarantees.

27. The Court is very doubtful that COI suggests that only Ahmadi followers with high profiles are targeted for attack. The blasphemy laws are directed at each and every member of the Ahmadi community. The OGN which the Minister relied upon states:

> *"3. 7.5 Ahmadis are prevented by law from engaging in the full practice of their faith. A 1974 constitutional amendment declares that Ahmadis are non-Muslims. Section 298(c), commonly referred to as the "anti-Ahmadi laws", prohibits from "posing as Muslims, Ahmadis may not call their places of worship "mosques, worship in non Ahmadi mosques or public prayer rooms which are otherwise open to all Muslims, perform the Muslim call to prayer, use the traditional Islamic greeting in public, publicly quote from the Koran, or display the basic affirmation of the Muslim faith. It is also illegal for Ahmadis to preach in public; to seek converts; or to produce, publish, or disseminate their religious materials. Ahmadis also are restricted in building new houses of worship, holding public conferences or other gatherings, and travelling to Saudi Arabia for religious purposes, including the hajj (the pilgrimage to Mecca required of all able-bodied Muslims). The punishment for violation of the law is imprisonment for up to three years and a fine. The authorities are also reported to conduct surveillance on Ahmadis, and several Ahmadi mosques have been closed or confiscated; and others reportedly desecrated or their construction stopped.*
>
> *3. 7. 6 Ahmadi leaders claim the government use sections of the penal code against their members for religious reasons. The government use anti-Ahmadi laws to target and harass Ahmadis and often accuse converts to the Ahmadi community of blasphemy, violations of anti-Ahmadi laws, or other crimes. The vague wording of the provision forbidding Ahmadis from directly or indirectly identifying themselves as Muslims enables officials to bring charges against Ahmadis for using the standard Muslim greeting and for naming their children Muhammad. It was reported that as of June 2010, 42 Ahmadis faced criminal charges under Ahmadi-specijic laws or blasphemy laws, and 25 Ahmadis faced false charges under other sections of the penal code. "*

28. The 2011 OGN refers to decisions of the UK asylum authorities as to the lesser risk faced by the "unexceptional" Ahmadi but the COI which is before this Court indicates a real and unpredictable risk of ordinary Ahmadis being arbitrarily attacked or arrested or prosecuted and punished simply for engaging in basic religious practices.

29. The respondents' submission that the grant of international protection is not warranted to an applicant as the death penalty imposed under the blasphemy laws is "in accordance with law" is wholly unsustainable. The argument seems to be that as a facet of its sovereignty, the Pakistani State is entitled to enact laws restricting the practice of minority religions such as the Ahmadis because those beliefs offend the dominant religious grouping. While restrictions on the manifestation of religion may occasionally be necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others (see Article 18(3), ICCPR) and may be justified when intended to foster and maintain religious pluralism (see the opinion of Advocate General Bot), those restrictions must be in proportion to the risk to be avoided. There are occasions when deeply held religious traditional practices and beliefs may have to be modified or restricted to ensure the best interests of the child. However, restrictions on religious freedom may not be imposed for discriminatory purposes or applied in a discriminatory way as seems to be the case with the Pakistani blasphemy laws which smack of the Penal Laws directed at Roman Catholics and dissenters in the seventeenth and eighteenth centuries or the various Edicts in France which declared Huguenots to be heretics and forbade the practice of their Calvinist services in public. As such, the Pakistani blasphemy laws are not what is understood to be a justifiable restriction on religious freedom in accordance with United Nations International Covenant on Civil and Political Rights or under the Geneva Convention Relating to the Status of Refugees.

30. The applicant has therefore established substantial grounds for the contention that the respondent's findings on state protection are irrational and unreasonable in the light of the COI on which he relied.

Delegation of Ministerial Duties

31. The deportation order in this case was not signed by the Minister for Justice and Equality; instead, it was signed by the Mr Waters, Director General of the Irish Naturalisation and Immigration Service (INIS) which is part of the Department of Justice and Equality. The deportation order states that Mr Waters is *"a person authorised by the Minister for Justice and Equality to authenticate the Official Seal of the Minister"*. The applicant argues that this is not permitted under s. 3 of the Immigration Act 1999. This argument was fully ventilated and carefully considered in *L.A. T & Others v. The Minister for Justice and Equality* [2011] IEHC 404 where Hogan J., applying the principles governing the relationship between civil servants and Ministers established in *Carltona Ltd. v. Commissioners of Works* [1943] 2 All E.R. 560, found that the decision to deport does not have to be made by the Minister personally. Cooke J. in *Afolabi v. Minister for Justice and Equality* [2012] IEHC 192 followed the decision of Hogan J. and refused to grant leave on this limb of the applicant's challenge. As was the case in *Afolabi*, so it is the case here that the applicant's arguments have already been decided and leave will not be granted on this ground.

32. The second limb to this aspect of the applicant's challenge is that the Minister erred in failing to personally make any lawful determination on refoulement. The basic contention is that the decision of Murray C.J. in *Meadows v. The Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 means that the Minister must personally consider whether the deportation of the applicant would breach the principle of refoulement. This argument was pursued before Hogan J. in *F.L. v. Minister for Justice and Equality* [2012] IEHC 189 where leave was refused on that point. Counsel for the applicant herein has informed the Court that a certificate was granted to appeal the issue to the Supreme Court in *F.L*. Hogan J. found that the comments of Murray C.J. in *Meadows* must not be understood out of context; Murray C.J. sought to emphasise that the Minister cannot be absolved from making a decision concerning the applicant's status. Specifically, the Minister had to consider her pleas that she faced female genital mutilation if returned to her country of origin, even though those issues had previously been addressed by the Commissioner or the Tribunal. Hogan J. therefore found that Murray C.J. cannot be regarded as expressing any views on the scope of the *Carltona* doctrine. It does not appear that Hogan J.'s decision in *F.L*. was opened to Cooke J. in *Afolabi* who considered that the matter was undecided and granted leave. This Court must observe that Hogan J. granted a certificate of leave to appeal to the Supreme Court on the precise issue of the personal obligation to consider refoulement in every deportation case. The Court will allow this issue to back up the Supreme Court decision in *F.L*.

Disproportionality

33. At the time of the leave hearing in this case, the decision of Kearns P. in Sivsivadze as to the constitutionality and compatibility of indefinite deportation orders with the ECHR was awaited. Meanwhile, in *Afolabi v. Minister for Justice and Equality* [2012) IEHC 192 (17th May 2012), Cooke J. refused to grant the applicant leave to amend his statement of grounds so as to include the *Sivsivadze* argument. Cooke J. found that the applicants in *Afolabi* were in a substantially different position to the family in *Sivsivadze* in that the entire Afolabi family unit had already been deported to Nigeria. In *Sivsivade*, in contrast, the husband I father had been deported to Georgia and the judicial review proceedings concerned the Minister's refusal to revoke the deportation order so that the applicant could apply to re-join his wife and two children in Ireland. His wife has humanitarian leave to remain on the basis that she had been severely beaten by a family member in Georgia, raising the implication that she could not visit him in Georgia. It was in those circumstances that leave was granted by Hogan J. Cooke J. found that the proportionality argument will arise only on the specific facts of a case because of the particular circumstances of the applicant.

34. The question of disproportionality was an academic issue for the Afolabi family as it is in this case where the applicant has not sought to explain why a theoretically indefinite deportation order would be disproportionate having regard to his particular circumstances. He presented to the asylum authorities as a single man whose family members are in Pakistan, Canada and the UK. He has no family members living in Ireland. He studied in Dublin for a number of months before applying for asylum but then moved into direct provision accommodation has not put forward any evidence or submissions relating to his private and family life in Ireland or his connections with the community. The extent of his connection with the State lies in his applications for protection.

35. In July 2011 he gave notice of his intention to marry a US citizen who he says he met in Ireland when she was visiting friends in July 2010. He says that while she is living and working in the US, she visited him for a week in February 2011. The Minister expressed doubts about the bona fides of the relationship and the Court was not informed whether in fact the marriage took place.

36. The decision of Kearns P. in *Sivsivadze* has now been delivered and he has found that a theoretically lifelong deportation order is not disproportionate, per se. Consequently the Court is satisfied that leave should not be granted in this case.

Effective Remedy

37. The Court finds no merit in the applicant's challenge to the Minister's decision under s. 17(1) of the Refugee Act 1996. The applicant is not a passive participant in the asylum process. With the benefit of legal advice he chose between two courses of conduct. He elected not to challenge the Tribunal's negative decision and chose instead to apply for subsidiary protection or humanitarian leave to remain. This is an unequivocal choice, an election from which- subject to the overriding interests of justice- a person cannot later resile. The application for subsidiary protection implies acceptance of the Minister's finding that his situation did not warrant a declaration of refugee status. As Cooke J. held in *N.D. v. The Minister for Justice and Law Reform* [2012] IEHC 44, it is a precondition of the admissibility of an application for subsidiary protection that the applicant is not a refugee. The applicant through his solicitors took the step of making submissions to the Minister addressing the findings of the asylum authorities and seeking to convince the Minister of his entitlement to subsidiary protection or leave to remain. Having been refused either form of complementary protection, the applicant in effect seeks to take two steps backwards and to impugn the refusal of refugee status which is quite simply unacceptable. It is a fundamental principle of law that a person may not approbate and reprobate.

38. That is not to say that no applicant will ever be granted leave to engage in such procedural backtracking. Rare and wholly exceptional circumstances may arise and have arisen which justify the grant of leave. For example in *M.M.L. (Angola) v. The Minister for Justice and Equality* (Unreported, ex tempore, High Court, Clark J., 21st March 2012) the Court found that the decisions of the Commissioner and the Tribunal had the appearance of such flaws that they should not be permitted to stand. The Commissioner's decision was peppered with mistakes, carelessness and factual errors and failed to properly consider the documentation submitted by the applicant. The Tribunal decision failed to address any of the specific submissions made in relation to the Commissioner's findings and yet failed to outline the reasons for upholding the Commissioner's decision. The Minister in his subsidiary protection and deportation decisions replicated the errors made in the Commissioner and Tribunal's decisions and relied heavily on the unchallenged credibility findings. In the light of that *"quite extraordinary series of errors"* which were *"unfortunate in the extreme"* and which gave rise to a *"real fear of a miscarriage of justice "*, the Court granted leave to challenge the decisions of the Commissioner and Tribunal notwithstanding the applicant's egregious delay and his legal advisers' failure to identify the flaws until the morning of the leave hearing.

39. In the present case, in contrast to *M.M.L. (Angola)*, the applicant has not focussed on any material flaws, errors, irrationality or unreasonableness in the decisions of the Commissioner and the Tribunal. He has simply relied on the general grounds advanced in *H.I.D. and B.A*. which is before the CJEU and has made no attempt to relate those grounds to his own case or to explain why he did not challenge the Tribunal decision on those grounds. His explanation that this is the first time he was informed that he is entitled to an effective remedy is not convincing and is quite insufficient. Moreover, as was the case in *P.M. v. The Minister for Justice and Equality & Others* [2011] I.E.H.C. 409 (28th November 2011), the applicant has not explained how he has been prejudiced by the suggested absence of an adequate remedy in the asylum process. In *P.M*, Hogan J. refused to grant leave to challenge the Minister's s. 17(1) decision on grounds similar to those advanced in this case. Having addressed the nature of the s. 17(1) decision, he concluded:-

> *"One way or the other, it is plain that an applicant has access to an effective remedy via the application for judicial review procedure provided for in 0. 84 RSC: see, e.g., B. v. Minister for Justice, Equality and Law Reform [201 OJ IEHC 296, ISOF v. Minister for Justice, Equality and Law Reform [2010} IEHC 457, Lofinmakin v. Minister for Justice, Equality*

and Law Reform [2011} IEHC 38, Albion Properties Ltd. v. Moonblast Ltd. [2011} IEHC 107 and Efe v. Minister for Justice, Equality and Law Reform [2011] IEHC 214.

21. In view of this case-law, it is unnecessary to explore this matter further in any detail. It is clear that the modern law of judicial review is sufficiently flexible and accommodating so that every legal right and entitlement- whether deriving from the common law, statute, the Constitution, ECHR or the European Union law itself- can and will be adequately protected."

40. In *P.M. v. The Minister (No. 2)* [20I2] I.E.H.C. 34 (31st January 20I2), Hogan J. refused a certificate of leave to appeal to the Supreme Court on the same argument. This Court adopts his findings and in the absence of any exceptional circumstances which might justify procedural backtracking, leave will not be granted on this ground.

Decision
41. Leave will be granted to seek orders of certiorari quashing the subsidiary protection and deportation decisions on ground 15 of the statement of grounds, namely:

(i) "The subsidiary protection and deportation decisions insofar as they were based on the country reports relied upon are irrational and unreasonable".

[1.] That parliamentarian and Minister, Shabaz Bhatti, a Christian was murdered in March 2011.

[2] Mr Bhatti member of the Cabinet and Salman Baseer the Governor of the Punjab were both assassinated in early 2011 for speaking out against the blasphemy laws.