THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 558 J.R.]

BETWEEN

S.I.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY,

THE REFUGEE APPEALS TRIBUNAL,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of February, 2016

1. The applicant was born in Nigeria in the early 1970s although she says she is unaware of her date of birth. She claims she encountered difficulties following the death of her husband, whereby in accordance with tribal customs, his brother sought to marry her.

2. In 2003, she came to Ireland. She states that she was "*trafficked*" here, although there is nothing to suggest that the trafficking was done without her consent. "*Trafficking*" in this context means by reason of an arrangement made with third parties. Applicants tend to refer to such third parties as "*agents*" unless of course they are claiming victimisation at the hands of such persons, in which case (and only in which case, as here) these persons are referred to as "*traffickers*". In reality, virtually all asylum seekers are trafficked. "*Agent*" is an unacceptable and rhetorical term which seeks to normalise and thereby impliedly excuse a trade which seeks to undermine the immigration control system on an industrial scale.

3. The applicant, as I have mentioned, claims that she was victimised (or as her counsel puts it, "*duped*") in the context of having arranged to be trafficked to Ireland. She contends that on arrival she was required to perform domestic service and child-minding for a five year period without pay. As the applicant's story unfolded, this claim appeared to take on dimensions beyond non-payment of wages and, as presented by her counsel, involved a claim of domestic servitude, false imprisonment and forced labour.

4. Despite looking after particular children for five years she was unable to state their names, a matter about which the Refugee Applications Commissioner was not altogether satisfied judging from contributions made on the commissioner's behalf at the tribunal hearing. The details of the alleged false imprisonment ("*not allowed to leave the house*" according to her counsel) and servitude in so far as they are set out on the papers are skeletal, almost to the point of invisibility.

5. On 4th January, 2013, she applied for asylum. That application was rejected by the Refugee Applications Commissioner by decision dated 8th February, 2013.

6. She then appealed to the Refugee Appeals Tribunal. The tribunal member, Mr. Conor Gallagher, B.L., rejected her appeal in a decision dated 2nd July, 2013.

7. This application for leave for judicial review, which is to be telescoped with the substantive hearing, is brought within time.

8. During the hearing before me, Mr. Michael Lynn, S.C., (who appeared with Mr. Paul O'Shea, B.L., who also addressed the court) for the applicant applied for an amendment to ground (c) in order to incorporate certain points she wished to advance in all submissions. This was granted on consent, and I appreciate the practical approach taken to the matter by Mr. Simon Boyle, S.C. (with Mr. Nap Keeling, B.L.) who appeared for the respondents.

Was the assessment of internal relocation contrary to reg. 7 of the 2000 regulations and art. 8 of the qualification directive?

9. Mr. Lynn submitted that the assessment of internal relocation was flawed and contrary to reg. 7 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006), and art. 8 of Directive 2004/83/EC (the qualification directive).

10. He complained firstly that the commissioner held that internal relocation may be unduly harsh (para. 3.3.2 of the commissioner's decision) whereas the tribunal found that internal relocation was available. In relation to this point, I have held in *M.N. v. Refugee Appeals Tribunal* [2015] IEHC 831 that a tribunal which itself provides an effective remedy against a lower body may nonetheless significantly alter the decision made (para. 23). The appeal to the tribunal is a complete rehearing (see *M.A.R.A. (Nigeria) v. Minister for Justice and Equality* [2014] IESC 71), and accordingly, the tribunal can vary the decision of the commissioner adversely to the applicant and resuscitate issues decided in the applicant's favour at that level.

11. Secondly, Mr. Lynn complains that the discussion of internal relocation fails to comply with reg. 7 and art. 8 because it fails to consider the personal circumstances of the applicant. However, the tribunal member provides a reasonably detailed decision in relation to internal relocation and has clearly considered the relevant circumstances including the personal circumstances of the applicant, even to the extent that acknowledging that internal relocation would give rise to a challenge for her. The existence of such a challenge is not in itself and in the absence of other factors a basis for concluding that internal relocation is not available.

12. Next, Mr. Lynn sought to advance an argument that under the *UNHCR Guidelines on International Protection on Internal Flight or*

Relocation, 23rd July, 2013, para. 34, the decision maker bears the burden of proof on internal relocation and it is up to the party asserting the availability of such relocation to establish the area concerned and to provide "*evidence*" that it is a reasonable alternative. He says that the tribunal has not referred to any "*positive evidence*" to show that internal relocation is an option.

13. Even if the UNHCR guidelines were binding, the decision is not flawed within those guidelines, because the tribunal does not say that the burden of proof is on the applicant. It says that there is no evidence to show that internal relocation is not an option.

14. More fundamentally, the UNHCR guidelines are not a legal instrument. If there were an ambiguity in any particular instrument of Irish law which was intended to give effect to an international convention, such as the 1951 Refugee Convention, a court might have regard to that convention or international instruments relevant to it in order to assist informing a view on resolving the ambiguity. However, in this case, there is no relevant ambiguity in the 2006 regulations of the kind that could be resolved by reference to the UNHCR guidelines of 2003. To grant relief to the applicant on the basis of the guidelines would be to give those guidelines a legal status which they do not enjoy and do not purport to have. It is clear on the face of the guidelines that they are intended simply to assist decision makers rather than to purport to provide a definitive interpretation of the Convention or fundamental principles of international law.

15. In particular, under the heading of this argument, Mr. Lynn complains that the need for treatment for the applicant's HIV should have been dealt with in the context of internal relocation, by examining what level of treatment is available and where. It seems to me that this is an attempt to rewrite the decision in a manner favourable to the applicant. It is a matter for the tribunal to assess the personal circumstances of the applicant in accordance with reg. 5(1)(c) of the 2006 regulations. The case made on her behalf before the tribunal was essentially that by reason of her illiteracy, trafficked status, HIV, and status as a single woman, she could not relocate to anywhere within Nigeria. On its face, this is an entirely unsustainable proposition. There are clearly numerous individuals falling into one or more of these categories who are capable of locating within Nigeria. The applicant did not make the case that HIV treatment was only available in limited parts of Nigeria. In *D. v. the United Kingdom,* Application No. 30240/96, 2nd May, 1997, the European Court of Human Rights held that only because of the seriousness of his condition, i.e. that he was near death, and had no one in his home territory of St. Kitt's to care for him, that expulsion was contrary to art. 3 of the ECHR. More recently, in *N. v. the United Kingdom*, Application No. 26565/05, 27th May, 2008, it was held that to expel a person with HIV, who is receiving treatment and will likely not receive such treatment once expelled is not a breach of art. 3. The Grand Chamber in that case also set out a detailed discussion of the Strasbourg caselaw on the expulsion of seriously ill persons since *D.* (see paras. 32-41). The court found that the principle in *D.* has been consistently applied in the intervening years (para. 42). In the absence of exceptional circumstances, "*[a]liens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3*".

16. The argument that the applicant could not relocate to the original village because she was trafficked from there does not appear to have been made to the tribunal, and in any event, is lacking in any factual basis. Mr. Lynn suggested that this may had been because the money for the trafficking was not paid and she feared reprisals, but this is pure speculation, has not been grounded, still less established, in evidence and in any event seems unlikely. People-traffickers would not be expected to carry out work in the absence of advance payment. The mere fact that the applicant was "*trafficked*" from her village does not establish that it would be unreasonable to expect her to return there. The incident whereby she arranged to be brought to Ireland, and then found herself involved what she said was domestic servitude here, is not on its face a matter likely to be repeated.

17. In any event, given that there was also a finding of an absence of a well-founded fear of persecution, the decision in relation to internal flight (if infirm, which I do not accept) could be severed, provided of course that the decision on well-founded fear was itself valid.

Is there a contradiction between a finding of no well-founded fear and a consideration of internal relocation?
18. Mr. Lynn submitted that the tribunal found that there was no well-founded fear of persecution, but went on to consider the question of whether internal relocation was available. The implication of this argument is that this gives rise to a contradiction in the decision, because on the authority of *K.D. (Nigeria) v. Refugee Appeals Tribunal* [2013] IEHC 481, per Clark J. at para. 28 "*internal relocation should only be considered if the Tribunal has decided that there is a well-founded fear of persecution"*.

19. For reasons more particularly discussed in my decision in *M.N. v. Refugee Appeals Tribunal* [2015] IEHC 831, I would respectfully disagree with the judgment of Clark J. in this respect and instead follow the judgments of MacEochaidh J. in *E.I. v. Minister for Justice and Equality* [2014] IEHC 27, and Faherty J. in *A.N. v. Refugee Appeals Tribunal* [2015] IEHC 699. As a matter of general first principles, a decision-maker has an option, having found against an applicant on one decisive ground, to either say nothing further, or alternatively to move on to consider one or more alternative decisive grounds. In the asylum context, this can be referred to as an "*even if I am wrong about the absence of a well-founded fear*" basis, although of course the decision maker does not have to specifically use the phrase "*even if I am wrong*" or any similar phrase. If there is a flaw in the reasoning in relation to any one or more of the alternative decisive grounds, as discussed in *M.N.* the overall decision will be allowed stand if it is supported by at least one valid ground capable of independently justifying the outcome, and of course provided that the case is not an exceptional one were a particular error is capable of contaminating the result overall.

20. Therefore there was nothing wrong with the tribunal going on to consider internal relocation, having previously found that there was no objective well-founded fear of persecution. Such consideration did not contradict the earlier finding or imply that it was incorrect.

Was the finding of an absence of objective well-founded fear incoherent and unreasonable?
21. The tribunal member found that the subjective fear of persecution related to essentially religious or magical techniques being used against her ("*spiritual or traditional*" means). He said that by the nature of things these were not objectively verifiable. This approach is obviously correct.

22. The best that Mr. Lynn can do in criticising it is to contend that the applicant's claim was wider than spiritual means, and included fears in the physical sense. He referred to her questionnaire at question 47, where she said "*you wouldn't know when they would come and attack you*", and question 51, that her persecutors "*can kill me or make me to run mad*". These extremely vague and nebulous statements are essentially valueless in the asylum context. They are so non-specific and meaningless as to fail to reach the level whereby they would need to be addressed narratively by the decision maker or indeed the level whereby even the most expansive view of any shared duty on the tribunal would trigger an obligation to inquire further.

Did the tribunal act unlawfully in failing to apply the rider to reg. 5(2) of the 2006 regulations in relation to serious harm?

23. Regulation 5(2) of the 2006 regulations provides that the fact that an applicant has already being subject to persecution or serious harm, or threats of such, is a serious indication of a well-founded fear in the absence of good reason of the contrary. So far, so uncontroversial. However the final clause of that paragraph goes on to say: *"but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection"*.

24. This phrase was described as a "*counter-exception"* by Cooke J. in *M.S.T. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 529 (at para. 29). However, it is unclear to me how the phrase "*counter-exception*" got off the ground in this context, given that a counter-exception is an exception to an exception, and that reg. 5(2) does not contain either an exception or a counter-exception. It contains a rule regarding inferring a need for protection, and an additional rider which contains an extended ground on which a need for protection may arise for an applicant.

25. Hogan J. in *S.N. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 451 describes it as a "*proviso*" (para. 25), although a proviso is a separate provision, normally beginning with the words "*provided that*", the effect of which "*is to narrow the effect of the preceding words"* (F. Bennion, Statutory Interpretation, 4th ed. (London, 2002), p. 616). In this case, the formula extends the meaning of the preceding words.

26. Cross J. in *J.T.M. v. Minister for Justice and Equality* [2012] IEHC 99 described the final clause of reg. 5(2) as "an added tail". It could also be referred to as a "rider" or "final clause".

27. In *M.S.T. v. Minister for Justice Equality and Law Reform* [2009] IEHC 529, Cooke J. on the one hand said 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"* (para. 32); but on the other hand that "[*t]he 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"* (para. 34). It is not altogether easy to reconcile these two perspectives. The latter element of his analysis was relied on by Clark J. in *N.N. v. Minister for Justice and Equality* [2012] IEHC 499 and Charleton J. in *Fr. M. v. Minister for Justice Equality and Law Reform* [2008] IEHC 107.

Does the "serious harm" element of the rider to reg. 5(2) apply only in the subsidiary protection context?
28. The first issue to be considered in relation to the rider is whether, as a matter of statutory interpretation the tribunal in an asylum case has to consider compelling reasons arising out of previous persecution only, or such persecution and serious harm.

29. It is clear from the 2006 regulations that they are intended to cover two quite different forms of decision; decisions by the commissioner and tribunal in relation to asylum, and decisions by the Minister in relation to subsidiary protection (see the definition of "*protection*" and the definition of "*application for protection*" in reg. 2(1) of the 2006 regulations).

30. An asylum application deals with persecution by virtue of the Refugee Act 1996, as amended by regs. 9 and 10 of the 2006 regulations. A subsidiary protection application, on the other hand, deals with serious harm as defined in reg. 2(1) of the 2006 regulations.

31. Given the drafting decision to deal with these two forms of application together not just in a single statutory instrument but also in an intertwined way throughout various individual provisions of the 2006 regulations (a questionable decision, if I may say so, even despite the fact that the qualification directive deals with both issues, given the potential for the generation of issues such as those in the present case), a reader of the 2006 regulations must be particularly alive to context, and not assume that every word of the regulations is intended to apply in full to both asylum and subsidiary protection decisions. On the contrary, it is clear from the very nature of such decisions that references in the regulations to persecution generally apply only to asylum processes, and references to "serious harm" as found in the regulations only apply to subsidiary protection decisions. This is for the very obvious reason, if nothing else, that to require an asylum decision maker to consider serious harm would do away with the need for subsidiary protection altogether. The very nature of subsidiary protection is to address other forms of serious harm not encompassed within the concept of persecution under the Refugee Act 1996 and the 1951 Refugee Convention.

32. In my view therefore, it follows that the 2006 regulations are to be construed on the basis that references to "*persecution or serious harm*" should be read as references to whichever of those concepts is applicable to the particular type of decision at hand. In the context of the present case, the tribunal was only required to apply its mind to the question of persecution, and in so far as reg. 5(2) or the rider to it in particular referred to serious harm, this was not a matter that had any relevance to an application for asylum such as the present one. In my view therefore, the decision of the tribunal cannot be questioned on the ground that it failed to "*address the question of quite serious harm*" as contended by the applicant.

33. It is worth noting that shortly after the tribunal decision in this case, a new reg. 5(2) was inserted by reg. 32(2) of the European Communities (Subsidiary Protection) Regulations 2013 (S.I. No. 46 of 2013) with effect from 14th November, 2013. This definition, which is now limited to asylum cases, has removed reference to serious harm altogether. This is consistent with the intention of the drafter to which I have referred, namely insofar as reg. 5(2) concerns asylum matters, only the provisions relating to persecution are relevant and not those relating to serious harm.

34. While I appreciate that some of the previous case law on reg. 5(2) does not proceed on this basis, that is because the point was not drawn to the court's attention in those cases. A point not argued is a point not decided: *The State (Quinn) v. Ryan* [1965] I.R. 70 per Ó Dálaigh C.J. at p. 120, as cited in numerous cases, *e.g., Ó Maicín v. Ireland* [2014] IESC 12 *per* Hardiman J. (dissenting) at paras. 83 to 84.

Whether there is evidence of serious harm
35. If serious harm had to be considered (a proposition I have rejected), there is in any event no infirmity arising in relation to a failure to consider serious harm, because there is simply no evidence of serious harm within the meaning of the 2006 regulations, namely the definition set out in reg. 2(1). "Serious harm" obviously does not enjoy its normal meaning in a context where it has been specifically defined. The only part of the definition that is potentially relevant is that which refers to "*torture or inhuman or degrading treatment or punishment of an applicant in the country of origin*". There is no evidence that the difficulties experienced by the applicant, even including what she says is forced servitude in Ireland, come within this definition. That is not to say that, if the applicant's story is correct, bringing her to Ireland for the purpose of requiring her to labour on an unpaid basis was not a breach of her rights. But the definitions of different forms of harm in international human rights law cannot simply be collapsed into one another. Torture or inhuman or degrading treatment is a particularly high test, as has been noted above in the context of the caselaw on HIV treatment under the ECHR. Persecution is another distinct category. Trafficking also has distinct features. It is not permissible to regard any and all forms of human rights violation as interchangeable and as liable to be simply transferred into whichever of these categories suits the particular argument being made in any individual case. The definitions of particular types of violation have an

integrity that would be entirely diluted and lost in such an impermissible exercise. Even if the applicant's story is to be believed, it did not amount to "*torture or inhuman or degrading treatment or punishment of an applicant in the country of origin*" in such a manner as to engage the definition of "serious harm" in reg. 2(1).

36. *N.B. v. Minister for Justice and Equality* [2015] IEHC 267 was a decision in which Faherty J. took the view that the trafficking and its consequences in that case triggered the rider and therefore amounted to past persecution (see paras. 60 and 64). Mr. Boyle submitted to me that the parties in that case do not appear to have drawn Faherty J.'s attention to the specific definition of "*serious harm*" (which is not referred to in the judgment other than obliquely in a partial reference to it in a quotation from *M.S.T.* in para. 30 that does not disclose the exhaustive nature of it). While that appears to be the case, my reading of para. 60 of the decision is that Faherty J. is of the view that the trafficking in that case amounted to persecution rather than serious harm, so there was no particular need for her to have considered the definition of the latter expression. Furthermore she seems to have proceeded on the basis that there was past persecution in that case which therefore would have been capable of triggering the rider, an issue to be discussed below. I do not read *N.B.* as a decision to the effect that in every case, trafficking would automatically amount to persecution.

37. Servitude and forced labour are self evidently significant human rights violations. However, they do not amount to torture or inhuman or degrading treatment or punishment as a matter of course. They may do in particular circumstances but to hold that they automatically do would, for example, collapse the distinction between arts. 3, 4 and 5 of the ECHR.

38. Furthermore, it is clear from the definition of "*serious harm*" that it only relates to serious harm in the country of origin. Whatever treatment an applicant receives in any other state is not serious harm within this definition.

Does the rider have to be considered in every case or merely where persecution has been found?
39. We now come to what is really the core of the present case. Mr. Lynn submits that the rider to reg. 5(2) is a key part of the test for protection, and therefore needs to be considered in every asylum case and not merely in a case where persecution has been found.

40. To address this issue it is necessary to go back to the detailed analysis of reg. 5(2) carried out by Hogan J. in *S.N.* Without quite comparing the doctrine of precedent to Chinese whispers, it seems to me that some of the small print of his analysis has not altogether survived in later iterations. The really critical aspect of Hogan J.'s decision emerges from para. 36, the context being that what was in issue was a subsidiary protection decision, so the question was firstly whether the applicant had suffered serious harm in the past. It is only, as Hogan J. puts it, "*if the answer to this question was in the affirmative"* that the decision maker need go on to consider whether such matters would not be repeated; and only *"[i]f that question was affirmative"*, would the obligation arise to consider the question of compelling reasons arising out of past persecution or serious harm in accordance with the rider. In other words, the application of the rider is predicated on an original finding of persecution or serious harm (as the case may be, I might take the liberty of adding).

41. I might respectfully suggest that this analysis is entirely in keeping with the structure and wording of the regulation. The rider by its terms does not apply unless there are "*compelling reasons arising out of previous persecution or serious harm alone*", which obviously presupposes and requires a finding that there has been previous persecution or serious harm, as the case may be. It can have no relevance to a case where there is no such finding.

42. In subsequent case law, however, the qualification that the rider does not arise in the absence of a finding of persecution in the first instance has been somewhat elided.

43. In *K.B. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 169, Mac Eochaidh J. comments at para. 13 that even if there are no facts which would warrant deploying the rider, the failure to consider it would be fatal to the decision. Reliance was placed on the decision of Hogan J. in *S.N.* in this regard. Mr. Boyle submits that this observation is *obiter* because in *K.B.,* such facts did exist, and therefore it was not necessary for the court to go on to comment on a situation where such facts were absent. I would accept this submission.

44. Mr. Boyle also submits that the obiter comment expressed at para. 13 of *K.B.* is in fact in conflict with *S.N.* which clearly recognises the necessity for a prior determination of persecution or serious harm. Such a determination simply could not be made if there were no facts warranting the consideration of the rider to reg. 5(2). In view of the structure and wording of reg. 5(2) I am driven to accept the submission that there is a conflict between *S.N.* and the obiter comments in *K.B.* in this respect, and for the reasons set out, I prefer the analysis in *S.N.* If there are no facts to warrant the deployment of the rider to reg. 5(2), the decision maker cannot be faulted for failure to consider it narratively.

45. Having preferred *S.N.* to *K.B.* in this respect, for the reasons stated, I am required also to follow that decision in preference to the reliance on *K.B.* in *N.B.*, albeit that the quotation in the latter case was obiter seeing as Faherty J. considered that there was in fact past persecution in *N.B.* I should mention for completeness that it is not clear whether Eagar J. relied on this particular analysis in *M.M. (Zimbabwe) v. Refugee Appeals Tribunal* [2015] IEHC 325 and may, like Faherty J. in *N.B.,* simply have taken the view that there was past persecution in that case.

46. While Mr. Lynn also relies on the Canadian judgment of *Viafar v. Minister for Citizenship and Immigration* [2006] F.C. 1526 (Dorson J.), at para. 6, where it is stated that all grounds for an asylum claim must be considered even if not raised by the applicant, and on the "*shared duty"* as between the tribunal and applicant, which would require the tribunal to consider the rider of its own motion, I consider that the approach in S.N. is a more satisfactory one as no purpose can be served by considering the rider in the absence of reasons to think it would bring anything to the table. Mr. Boyle describes the approach urged by the applicant as a "*box-ticking exercise*" and I would respectfully agree. A failure to engage in such an exercise is not a basis for quashing a decision that deals reasonably with facts that are in reality central to the actual case.

Was there past persecution such as to require narrative consideration of the rider to reg. 5(2)?
47. Mr. Lynn submitted that there was in fact past persecution in this case, consisting of two elements. Firstly, there is her story in relation to difficulties in Nigeria, and the witchcraft threatened against her there. Secondly, there is her claim of being trafficked to Ireland and being required to engage in unpaid labour.

48. As regards the claim of persecution by family members through witchcraft and the like, the tribunal member held, as I have already pointed out, that this fear was not objectively well-founded. As set out earlier in this judgment, not only was that decision not irrational, it was clearly correct.

49. The second leg of Mr. Lynn's argument was that the trafficking and alleged servitude amounted to persecution within the meaning of the Convention which itself is a springboard for deploying the rider to reg. 5(2) and therefore quashing the decision for failure to give narrative consideration to that rider. I will leave aside for the moment whether this servitude actually occurred in the manner alleged.

50. "Persecution" is not defined in the 2006 regulations, but as Hogan J. said in S.N. at para. 33, the provisions of the regulations "*must nonetheless be interpreted in a manner compatible with the Directive itself*" (speaking in the context of interpreting the rider generally rather than solely the term "persecution" within that rider).

51. The term "persecution" is not defined specifically in the qualification directive either. Mr. Lynn urges me, in effect, to apply the definition of "acts of persecution" in art. 9 of that directive. That provision makes reference to acts which amount to "*a severe violation of basic human rights*", or other human rights violations which are sufficiently severe as to affect an individual in a similar manner. He submits that the trafficking and servitude of the applicant constitutes acts of persecution within this definition and the fact that this conduct took largely place in Ireland is immaterial.

52. However, to equate "acts of persecution" with "persecution" would be to give effect to only a partial and distorted interpretation of the directive. It would be to put forward an extremely wide definition of persecution, shorn of necessary qualifications required by the directive. In particular, the directive also defines "actors of persecution or serious harm" in art. 6, thereby implying that only acts of persecution committed by actors of persecution come within the definition of "persecution" for the purposes of international protection.

53. While the definition of "actors of persecution" is expressed to be inclusive of the categories specified, those categories include all state actors and all non-state actors that meet the condition that the state is not providing effective protection, there are only a limited number of other actors that could be included (e.g., intervening states acting within the territory of the state of origin) unless the condition applying to non-state actors was to be set aside. This would seem to me to do violence to the purpose of the qualification directive.

54. In the present case, the actor of persecution is alleged to be the woman who allegedly required the applicant to engage in unpaid labour. She is, of course, a non-state actor. Thus, under art. 6(c) of the directive, she qualifies as an actor of persecution if the State is "*unable or unwilling to provide protection against persecution or serious harm as defined in Article 7",* unless some clear basis exists to disregard this qualification, which I cannot see in the present case even if, in principle, such disregard were possible.

55. Therefore, in order to find that the experiences of the applicant in Ireland amount to persecution, I would have to find that this State is unable or unwilling to provide her with protection. That is a clearly unsustainable position.

56. Insofar as the applicant is limited under this heading to the complaint in relation to events in Nigeria, she has not shown that there was evidence before the tribunal which it should have been concluded that the applicant was persecuted there. The applicant appears to have contended herself with very vague and laconic statements in relation to many of her experiences. There is certainly an absence of evidence that there was anything involuntary from her departure from Nigeria. In the absence of evidence of matters reaching the threshold in Nigeria, the necessity to consider the rider to reg. 5(2) simply did not arise.

57. Mr. Lynn relies on the UNHCR guidelines in relation to victims of trafficking (*UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked,* 7th April, 2006) at para. 15, which suggests that trafficking could amount to persecution in particular circumstances. However, it is clear even from that document (which itself is of course only a guidance note) that a quite significant threshold is envisaged before the test for persecution could be met. In this case, there is simply no evidence of that threshold being met.

58. In any event, the matter should have been clearly put to the tribunal by the applicant. The tribunal member records the submission made as to the nature of persecution, which clearly does not include any reference to trafficking or domestic servitude. The claim made to the tribunal relates to the original story of persecution. A court should be reluctant to quash a decision made by an administrative body, even one subject to a "shared duty", on the basis of a failure to deal with an argument that was not made, and certainly not clearly made, to that body.

59. Finally, the tribunal member proceeded on the basis that it was "*accepted*" that the applicant's story in relation to trafficking and servitude was correct. An issue arose at the hearing as to whether this meant it was accepted by the tribunal or by the commissioner. Given the absence of any discussion of the issue by the tribunal, or any reasons for accepting this account, I infer that the reference can only mean that the tribunal thought that the claim of servitude was accepted by the commissioner. However, that finding does not appear to be correct, because, as appears from the decision, the presenting officer queried the fact that the applicant did not know the names of the children she had been allegedly required to look after for a five-year period.

60. When I asked Mr. Lynn how it could be that the applicant did not know the names of children she had been responsible for on a daily basis for five years, he suggested that it may have been simply that she was unwilling to name them for fear of reprisals. This is speculation but in any event appears unlikely given that she made a complaint to the Garda Siochána about the alleged servitude. It does not, in fact, appear from the decision as to whether or not there was an explanation for her failure to know the names of the children or indeed for the vague nature of her claims overall in this respect. On the face of it, her inability to provide the children's names leaves her story in this respect somewhat open to question. Mr. Lynn submits that I cannot go behind any statement in the tribunal decision in this regard, even one based on a concession or a mistaken view of the position of the commissioner, as I understood him to say, although his primary submission was that "*accepted*" meant accepted by the tribunal rather than the commissioner. He submits that the court should not take into account the apparent inherent implausibility of the applicant's story in the exercise of the discretion attaching to the grant of remedies by way of judicial review. I would not accept any of these submissions.

61. As a matter of principle, if a party to judicial review proceedings put forward a version of events that was as much of an affront to common sense as the notion that one could look after the children of a family for five years on a daily basis in the relatively recent past and be unable to remember their names, without feeling under any obligation to put forward any explanation for this situation, then a court might, in the exercise of its discretion, consider the absence of an explanation to be a basis for declining to grant any relief. If it had been necessary to decide the case on this point, I would have given the applicant an opportunity to clarify the position before making a decision on whether relief should be granted.

62. I would finally observe that the matter of alleged servitude in Ireland did not form part of any finding that this amounted to

persecution and, therefore, was not part of the core decision of the tribunal. It does not appear to me that the Minister is automatically bound to accept the applicant's version of events as set out or "*accepted*" in the tribunal decision in this respect, such as it is, when considering subsidiary protection or humanitarian leave to remain, and she may consider it appropriate to investigate it further to see whether it can be substantiated at the very high level (amounting to false imprisonment, forced labour and servitude) at which that version of events was pitched before me.

Validity of the rider to reg. 5(2)

63. An issue that naturally arises from the foregoing discussion is whether the rider is, in fact, *intra vires* the European Communities Act 1972, since it goes beyond the parameters of the qualification directive. While, of course, the rider is "*compatible with*" the qualification directive (as Cooke J. held in M.S.T., at para. 36), in the sense that Member States are permitted to adopt "*more favourable standards*" than the E.U. minimum (see art. 3 of the directive), it is not "*necessitated by*" the directive. The recast 2011 qualification directive, which does not apply to Ireland, does however include such a provision (art. 4(4)), but in the absence of any provision in the original directive corresponding to this rider only reinforces the point that its absence from the original directive means that it was not necessitated thereby. The basis for it to have been included in the 2006 regulations, under the 1972 Act, is therefore unclear at best. However, in view of the conclusion I have arrived as to the meaning of the rider, as applied to this case, the question of validity does not arise. Had it arisen, it might have been necessary to explore whether some form of *amicus curiae* could have been put in place to assist the court in this respect, given that neither the applicant nor the State are in a position to contest the rider's validity.

64. In *S.N.*, Hogan J. made a spirited attempt to impliedly defend the validity of the rider by construing it as applicable where the past persecution only provided weak evidence of future persecution, in other words where the future risk was "small" (para. 36). Practical though this approach is, it is hard to reconcile with the word "*alone*" in reg. 5(2). Reasons arising from past persecution *alone* means reasons not connected with possible future persecution, not reasons only weakly connected with future persecution. It is unclear whether reg. 5(2) can be saved in the manner suggested in S.N. The same difficulty attaches to Cooke J.'s already-referred to suggestion that the rider was not intended to extend the ambit of protection. Such an analysis really drains all meaning from the word "*alone*" in the rider.

65. An alternative approach to support the validity of the rider was taken by Cooke J. in *M.S.T.*, in holding that the rider was a legitimate "incidental" or "supplementary" provision within s. 3(2) of the 1972 Act (paras. 37 to 39). Whether that section can or should be read in such a wide manner does not arise in the present case given my finding that the rider was not, in any event, contravened.

Order

66. For the foregoing reasons, I will order:-

(i) that leave be granted in accordance with the amended statement of grounds but that substantive relief be refused;

(ii) that the matter be adjourned to enable the parties to consider any consequential applications; and

(iii) that any party intending to make such application should give the other party advance particulars in that regard.