S78

Supreme Court of Ireland Decisions

Judgment

Title:	AAA & anor -v- The Minister for Justice & ors
Neutral Citation:	[2017] IESC 80
Supreme Court Record Number:	248/12
High Court Record Number:	2011 1007 JR
Date of Delivery:	21/12/2017
Court:	Supreme Court
Composition of Court:	Dunne J., Charleton J., Hogan J.
Judgment by:	Charleton J.
Status:	Approved
Result:	Appeal dismissed

Judgments by	Link to Judgment	Concurring
Charleton J.	Link	Dunne J., Hogan J.

–

1

An Chúirt Uachtarach
The Supreme Court

Dunne J
Charleton J
Hogan J

Supreme Court appeal number: 2012 no 248
[2017] IESC 000
High Court record number: 2011 no 1007JR

Between

AAA and JAA (an infant suing by his mother and next friend AAA) and EAA (an infant suing by her mother and next friend AAA) and SAA (an infant suing by his mother and next friend AAA) (Nigeria)
Applicants/Appellants

- and -

The Minister for Justice, Ireland and the Attorney General
Respondents

Judgment of Mr Justice Peter Charleton of Thursday the 21st of December 2017

1. This appeal on a failed refugee status claim and unsuccessful subsidiary protection application arises most immediately from the judgment of Cooke J in the High Court of 17 May 2012. The consequent notice of appeal is dated 5 June 2012. The original notice of motion seeking leave to apply for judicial review was dated 14 November 2011 and sought 15 reliefs on behalf of the applicants.

2. In essence, on the hearing of this appeal, the argument centred on the refusal of the trial judge to grant leave to the applicants to commence a judicial review proceeding on three grounds: that, firstly, where an applicant is refused subsidiary protection by the respondent Minister, there must be an effective judicial scrutiny of that decision by way of a full appeal on the law and on the merits; that, secondly, there has been an absence of a practical examination of the claim due to the applicant not having received an oral interview prior to the decision; and, thirdly, that the decision of the trial judge ought to have awaited and should have been bound by the interpretation of the relevant legislation by the Court of Justice of the European Union. Cooke J granted the applicants leave to apply for judicial review on the following sole ground, as set out in the order of the Court dated 17 May 2012:

> The deportation orders are invalid by reason of the first named Respondent not having personally considered whether the State's non-refoulement obligations would be breached by the deportation of the Applicants

3. In a judgment delivered on 10 September 2013, McDermott J refused the application for judicial review.

Application for leave

4. The test for leave to commence judicial review was set out in *G v Director of Public Prosecutions* [1994] 1 IR 374 by Finlay CJ at pages 377-378:

> An applicant must satisfy the court in prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:-

> (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4).
>
> (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.
>
> (c) That on these facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.
>
> (d) That the application has been made promptly and … within the … [relevant] time limits…
>
> (e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be in order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, in all the facts of the case, a more appropriate method of procedure.

5. In discussing the above test, in *EsmÉ v Minister for Justice* [2015] IESC 26, Charleton J stated the following at paragraph 15:

> Any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. It is required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty. There would be no filtering process were mere arguability to be the test without, at the same time, taking into account that trivial or unstatable cases are to be excluded: the standard of the legal point must be such that, in the absence of argument to the contrary, the thrust of the argument indicates that reasonable prospects of success have been demonstrated. It is still required to be shown that a prima facie legal argument has been established.

6. It was further noted at paragraph 12 that "application for judicial review of decisions made by the Refugee Applications Commissioner, the Refugee Appeals Tribunal and the respondent Minister are generally subject to a more stringent test than normal before leave to commence judicial review may be granted." In this case, however, the *G* test is applied.

Background

7. The applicants are a mother and three children, constituting what is claimed to be a

single-parent family, due to what were alleged to be violent circumstances which caused the father to disappear, and it was alleged another child, but which were found to be incredible when examined by the Refugee Applications Commissioner and the Refugee Appeals Tribunal. The applicants came to Ireland on or around 17 July 2007 when the mother was pregnant. The Refugee Appeals Tribunal, having heard oral evidence and considered documentation, which did not include any personal papers of any of the applicants, rejected their claim to qualify for refugee status on 30 August 2010. On the applicants being written to by the respondent Minister, informing them of their entitlement to apply for leave to remain on humanitarian grounds and to apply for subsidiary protection, they so applied. These applications were rejected by the respondent Minister on 5 June 2011 and consequently, deportation orders were signed by the respondent Minister on 27 September 2011 and notified by letter to the applicants on 4 October 2011. On 14 December 2011, all of the applicants were repatriated to Nigeria and have been living there for the last six years. Their current circumstances are unknown. Even still, they instructed their solicitors to pursue this appeal and have "remained in touch", according to submissions on the appeal. Even if, as counsel for the respondents suggested, there were any up-to-date information as to their circumstances, this might be of little value as the possibilities of verification or checking such information would be minimal.

8. The first applicant claims that she lived in an oil-rich area of Nigeria and that her family had had no difficulty up to 10 March 2007. The address which she gave was spelt variously and inconsistently as between her written applications and later oral hearings. Her account was of rape, the abduction of her husband and eldest son, beatings, threats and extortion inflicted on her family by a group of unknown men in consequence of her family giving shelter to four unknown expatriates from Europe and Canada who worked in the oil industry. Upon this experience, she sought help from tribal elders, from the police and from the "Celestial Church of God", a Christian group, but to no avail. Assistance was available, however, from the Catholic Church and after obtaining sanctuary there for what she stated was almost a month, she travelled with her family by air to Ireland, stopping once. The stopping place was described as unknown in her written documentation but was later claimed to be France.

9. At her address in Nigeria, the first applicant claimed to live in an apartment. This accommodation, however, was supposed to have had a basement. Four men came rushing into the apartment on 10 March 2007 and asked for help because they were being "pursued by Niger-Delta militants." The trouble was, apparently, money, specifically a demand for £20,000. They begged her husband to "save them from being taken away by the militant boys". They agreed to help them "by letting them into our apartment and hide them where nobody could see them." This apparently was in a hole in the kitchen which was covered up so that the militants, when they came, "checked the whole apartment but could not find anybody". It was claimed that they beat up her husband. It was also claimed that the militants then left but returned a day or so later when the expatriates continued to hide in the basement or hole. Even though, apparently, the family had nothing to do with this issue as to debt,

or whatever it was, the militants continued to demand money from them and savagely beat her husband "to the extent they removed one of his tooth, slapped me and also threw the children in the chair". A "one week ultimatum to make the money available to them" was given or else "they would deal with us ruthlessly". About two weeks later, the militants called again and beat up her husband and it is said abducted him and her eldest son. The militants continued to return, it was claimed, and on one of the occasions even though the men were not in the basement or hole, they had been seen by the militants escaping out of the backyard and so considered that they had been sheltered by this family. On one occasion, the applicant claims to have been raped and described this as being perpetrated by one man though on another occasion referred to multiple perpetrators.

10. Oral evidence was given before both the Refugee Applications Commissioner and the Refugee Appeals Tribunal. The decision of the appellate statutory body was given on 30 August 2010. In it, the deciding member summarised the evidence of the first applicant in relation to her giving refuge to "Roy and Gerard and two other Canadian guys." Reference was also made to her going to Ijaw elders to look for their help and resort to the police, who it was claimed, would do nothing.

11. The claim was assessed under the Refugee Act 1996, as amended. Referencing s 11B, the deciding member had regard to the criteria therein stated in relation to credibility. The decision, no correction being herein made, states:

> The … Applicant has submitted no personal documentation from her Country of Origin to confirm that she ever had the difficulties she alleges in her Country of Origin or that she ever lived and resided in Port Harcourt. … On examination of this Applicant's claim a number of inconsistencies and credibility issues arise which are not properly explained by the Applicant and are such that I do not believe that she ever had the difficulties she alleges in her Country of Origin or has any fear of returning there as she claims. The Applicant was asked to write down her address at which she resided in Port Harcourt and she wrote it down in her evidence at appeal as [address redacted]. It was put to the Applicant that she had given a different spelling for her address at which she claimed to have resided … in her Questionnaire. … The Applicant was asked as to why did she write this and she replied "that's the spelling I wrote there for you". … The Applicant did not claim to have any such uncertainty or difficulty spelling this name prior to the inconsistency in her account being put to her in her evidence at appeal and I found her to be vague and evasive in the explanations offered by her for the inconsistency. In her evidence … the Applicant described the alleged incident of the 6th May, 2007 in which she claimed she was raped. In her evidence … she stated that it was four militants that called to her home on this occasion. She says that she was raped by only one of them. It was put to the Applicant that in her Questionnaire she had stated "on the 6th of May 2007 two of the militants came to the house again, they raped me in the presence of my kids." When this was put to

> the Applicant the Applicant stated that there were four. She says two of them stayed at the gate and two of them came into the house. She confirmed that it was only one of them that raped her however. It was put to the Applicant that her Questionnaire referred to two of the militants coming to the house and stated "they raped me". The Applicant was asked to explain the inconsistency and she stated that "when she wants to say it now she uses they for them".

12. The deciding member found the applicant to be "vague and evasive in her manner of answering questions raised by the Tribunal" and found that "her manner of answering such questions was … a deliberate attempt by her to confuse the evidence." It was ruled that she had held no fear of persecution in respect of herself or her children. Consequently, it was ruled that the burden of proof, described as being that there is a "reasonable degree of likelihood" that the person claiming refugee status "will be persecuted for a Convention reason" if they return to their country of origin was not discharged.

13. Turning to the letters sent on behalf of the applicants claiming humanitarian leave to remain within the State and for subsidiary protection, it is notable that no fact beyond the original allegations and certain humanitarian issues as to the social integration of the family were advanced. In addition, a multitude of material was advanced as to the position of the police in Nigeria. This was generally available material but without the original allegation having foundation or credibility, it would prove to be only of general, as opposed to specific, interest.

Subsidiary Protection

14. Regulation 2(1) of the European Communities (Eligibility for Protection) Regulations 2006 states that a person is entitled to subsidiary protection where, not being a national of a Member State of the European Union, not qualifying for refugee status, and not being a war criminal, is a person "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" and "is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country". A refugee is someone whose country would threaten the "life or freedom of that person … on account of his or her race, religion, nationality, membership of a particular social group or political opinion"; see s 5 of the Refugee Act 1996. In contrast, a person claiming subsidiary protection does not need to show this form of targeted persecution. Rather their country has to be demonstrated to be one where random violence has broken out, as in a civil war or invasion by a foreign power, so that the place is unsafe, leaving people at risk of serious harm. Due to human nature, serious harm occurs to citizens and visitors even in the best organised countries simply because criminals do not limit their activities to computer fraud or pick-pocketing, but also resort to bank robberies and burglaries using deadly weapons. Such countries, being in a state of peace, have competent police forces. For subsidiary protection to be availed of in another country, what would be more akin to a state of general lawlessness resulting in random violence in the country of origin

needs to be demonstrated; see *FN v Minister for Justice* [2009] 1 IR 88, and also see Case C-285/12, *Diakite v Commissaire gÉnÉral aux rÉfugiÉs et aux apatrides*, where at paragraph 21 the Court of Justice referred to "internal armed conflict, provided that such conflict involves indiscriminate violence".

15. *Refoulement*, the return of a person from a country where they are safe to a country where they will be at risk of being persecuted, is forbidden in international law and by s 5 of the Refugee Act 1996. A person may, by way of example, leave a country on business to subsequently find out that a new regime has found favour with the electorate or has taken power by force, or by a combination of force and fraud as in the Germany of 1933, and has declared that particular sectors of society are excluded from any human rights protection. This may be temporary, but once refugee status has been granted under Irish law, the circumstances for revoking it are limited. It is what is happening on the ground at the time in the country of origin that is important, and it is the immediate or reasonably apprehended nature of the threat to the group from which the refugee hails that determines the granting of such status. Consequently, the international protection that may be granted can result from fleeing a country or can be in consequence of a change in social organisation when an applicant has left. It is just as valid to be a refugee *sur place* as to be a refugee who has fled active persecution. The test required to be met by the Regulation for subsidiary protection also carries that test of immediacy. To qualify for subsidiary protection, the person must face a risk of serious harm from generalised or random violence "if returned" to their country of origin just as a person cannot "be expelled from the State or returned in any manner whatsoever to the frontiers of territories", under s 5 of the Refugee Act where such would give rise to the threat of persecution on ethnic, religious, national, or social grounds.

16. Here, the applicants are currently in Nigeria. They did not advance credible evidence to the respondent Minister which demonstrated that they were at serious risk of indiscriminate violence from armed conflict. Consequently, they are not eligible for subsidiary protection. Any situation of illegal expulsion from the State argued to be part of a scheme of undermining international protection does not arise for decision on this appeal. No such case was ever made out.

Effective remedy

17. The applicants claim to have been denied an effective remedy since, they argue, the decision of the respondent Minister is not subject to judicial scrutiny. In particular, it was said that the absence of a right of appeal with the possibility of an *ex nunc* review, meaning a review of the situation as of now, amounted to a denial of an effective review.

18. Undoubtedly, under the system in place at the time of these decisions, it was not open to the High Court engaged in a judicial review of these decisions to substitute its own view for that of the decision maker. Nor, to go a step further, could judicial scrutiny arrogate to itself the function reserved to the respondent Minister under the Refugee Act 1996 and actually declare a grant of refugee status or entitlement to

subsidiary protection. That, however, does not mean that the powers of the High Court on review are shorn of responsibility to quash decisions that offend fundamental reason and common sense. In contrast to some other jurisdictions which follow a Roman law model, the High Court exercising its power of judicial review does not act as a court of correction. The powers of the High Court cannot be isolated from its function in analysis and in returning the original issue to the competent administrative or quasi-judicial body for reconsideration.

19. The traditional view of judicial review is that it relates solely to procedure and to jurisdiction. The theory behind the ability of the High Court to quash decisions that were unreasonable was that no administrative or quasi-judicial body had jurisdiction to make decisions contrary to fundamental reason. In the field of refugee law, since the early 1980s, there had been a debate regarding the application of this principle to international protection applications, and as to whether a form of heightened, or anxious, scrutiny ought to be applied. This debate met with some favour among judges. In *FN*, it was noted that there was strong evidence for the proposition that judges, in considering decisions taken pursuant to the Refugee Act 1996, exercise a heightened level of scrutiny when compared to other forms of judicial review. Charleton J said he did not think it would be fair to "the principle of the primary importance of human rights" to apply the ordinary test set out in *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 when reviewing the Minister's decision as to the situation in the applicant's country of origin and the availability of protection within that territory. He said at paragraph 57:

> Rather, it seems to me, that a decision on the country of origin of an applicant and the availability of protection within its territory should be scrutinised if a judicial review is taken and the decision should only stand if it be a rational one that is fairly supported by the country of origin information. That, it seems to me, is what Council Directive No. 2005/85/EC, the procedures Directive, is seeking to achieve when placing on the examining bodies and member states the responsibility in making objective and impartial decisions based on precise and up to date information from reliable sources.

20. However, the concept of anxious scrutiny was not adopted unilaterally. Doubts were expressed by a number of judges about the merits of departing from the standard *O'Keeffe* test and the vagueness of the term "anxious scrutiny". In *Nascimento v The Minister for Justice* [2011] 1 IR 1, Dunne J said at paragraph 102:

> It seems to me that courts are not applying a test of "anxious scrutiny" so much as determining where the balance lies in relation to competing rights. For example in asylum cases, the State has a right to control immigration but an asylum seeker has a right not to be returned to a country where he could be subjected to breaches of human rights. In such cases, the courts will examine the decision concerned with great care and will determine where the balance lies having regard to the competing rights involved. It is likely that in a case where there is a real risk of a breach of an individual's human rights, the courts will attach great weight to that fact but ultimately it seems to me that the test has

to be whether the relevant decision at issue is unreasonable or irrational.

21. This matter was resolved by this Court in *Meadows v Minister for Justice* [2010] 2 IR 701. In that international protection appeal, there a judicial review of refusal of refugee status, it was held that the proportionality of the decision could be reviewed in the context of the rationality of that decision. Denham J at paragraphs 142-143 held that the prior formulation of the test had set out "broad principles" which form "the general test". The *O'Keeffe* principles were a narrower aspect of that test and apply where the decision was taken by a technical or skilled or professional decision maker in the area of that special technical or skilled knowledge. The "general test", she said, comprised the following relevant factors at paragraph 144:

> (i) in judicial review the decision-making process is reviewed;
> (ii) it is not an appeal on the merits;
> (iii) the onus of proof rests upon the applicant at all times;
> (iv) in considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense;
> (v) the nature of the decision and decision maker being reviewed is relevant to the application of the test;
> (vi) where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the court should be slow to intervene in the technical area;
> (vii) the court should have regard to what Henchy J. in *The State (Keegan) v.*
> *Stardust Compensation Tribunal* referred to as the "implied constitutional limitation of jurisdiction" in all decision making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision.

22. In *Meadows,* the concept of proportionality was held to operate within the confines of the irrationality test. As Murray CJ held at paragraph 57-58:

> In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the court should not have recourse to the principle of proportionality in determining those issues. It is already well established that the court may do so when considering whether the Oireachtas has exceeded its constitutional powers in the enactment of legislation. The principle requires that the effects on, or prejudice to, an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision. Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness.

23. It remains the case that where the principle of proportionality is relevant, as it is

claimed to be by these applicants, the onus rests on an applicant to establish that the decision is disproportionate. Denham J agreed that there is an underlying harmony between the test of proportionality and the test of reasonableness. At paragraph 141, she stated that:

> The nature of the proportionality test is that, as described above, it must be rationally connected to the objective; not arbitrary, unfair, or irrational. The inherent similarity may be seen in the requirement in *O'Keeffe* … that the decision not be irrational, or at variance with reason or common sense.

24. Similarly, at paragraph 448, Fennelly J found that the application of the principle of proportionality could provide "a sufficient and more consistent standard of review, without resort to vaguer notions of anxious scrutiny." He held that the "underlying facts and circumstances of cases can and do vary infinitely", but that the irrationality test would be "sufficiently responsive to the needs of any particular case."

25. It suffices to note that in *NM v The Minister for Justice, Equality and Law Reform* [2016] IECA 217, Hogan J analysed the origin of the reasonableness rule, its development in the *Meadows* decision and the manner of its application in various decisions of the High Court since that time, including *ISOF v Minister for Justice, Equality and Law Reform* [2010] IEHC 457, and concluded that judicial review was an effective remedy. While limitations, principally the unavailability of a power to substitute findings of fact and only having the ability to annul a decision, circumscribed the role of the High Court in judicial review, nonetheless Hogan J found at paragraph 42 that there was vested in the role of the judge the ability to "subject the reasons of the decision maker to thorough review." In *NM*, at paragraph 56, Hogan J noted that the Court of Justice, in Case C-69/10, *Diouf v Ministre du Travail, de l'Emploi et de l'Immigration,* had held that the effective remedy requirements of Article 39 of the Procedures Directive (2005/85/EC) did not require Member States to prescribe a particular form of remedy provided that:

> …the legality of the final decision adopted in an accelerated procedure - and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded - may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application.

26. In *NM,* Hogan J held that post-*Meadows*, judicial review was sufficiently flexible to accommodate the "thorough review" requirements of *Diouf,* even if the earlier "no evidence" standard required by *O'Keeffe* would not. There is, however, no authority for any wider proposition to the effect that only a right of appeal from the Minister's decision would amount to an effective remedy in this context, and *Diouf* is an authority to the contrary. In the absence of any express provision in the Directive itself requiring Member States to provide for a right of appeal, as distinct from judicial review or something approximating to judicial review, any other conclusion would seem at variance with the fundamental principle of EU law of national procedural autonomy. Thereby, Member States are entitled to determine their own legal procedures, subject to the principles of equivalence and effectiveness. While the

full extent of the interaction of proportionality in decision making with the duty to act reasonably, as cast on administrative and quasi-judicial bodies, should await scrutiny in an appropriate case, every case remains fact specific. On this appeal, there was no fact demonstrated in any decision affecting the applicants as being so unreasonable as to require it to be quashed or so lacking in proportion to the evidence presented as to fail to be reasonable in itself.

27. A point in the notice of appeal claiming that s 3(1) of the Immigration Act 1999 enabling deportation "is unconstitutional insofar as it requires" the respondent Minister "when making such a deportation order to regard such order as indefinite" was not argued. In any event, statutory provisions must be read in context. Here, the relevant context is the entitlement to revoke a deportation order which is also vested in the respondent Minister under s 3(11) of the same Act. That point has, in any event, been determined by this Court in *Sivsivadze v Minister for Justice* [2016] 2 IR 403.

Right to be heard

28. The structure of the procedure for applying for international protection under the legislative scheme in Ireland has been that all persons who wish to apply for subsidiary protection must, in the first instance, be an individual "who does not qualify as a refugee". To reach the stage of applying for the right to remain in Ireland because of non-persecutory violence in the country of origin, an applicant will already have made a written application claiming refugee status to the Refugee Applications Commissioner, have been heard by that body orally, will usually have put in a notice of appeal to the Refugee Appeals Tribunal and will have, save in exceptional cases, been granted a complete rehearing of their case. Under the bifurcated system that has historically been in operation, which has now changed to a unitary procedure, an application for subsidiary protection came when the respondent Minister continued into a consideration as to whether to order deportation. As in the procedure in this case, it was then that an applicant was written to giving him or her an opportunity to seek leave to remain on humanitarian grounds or to seek subsidiary protection, or, as was common, both.

29. In *MM v Minister for Justice and Law Reform* [2013] 1 IR 370, a reference had been made by Hogan J to the Court of Justice of the European Union regarding the duty of cooperation required by the respondent Minister in a subsidiary protection application, as to whether a draft of any possible adverse decision had to be supplied to the applicant for comment prior to its formal adoption. In answering that question, the Court of Justice of the European Union also commented on the extent to which the State was obliged to give an applicant a separate opportunity to be heard wherever an application for subsidiary protection was made; Case C-277/11, *MM v Minister for Justice, Equality and Law Reform*, 22 November 2012. At paragraphs 91-92 of that judgment, the Court of Justice commented that where a Member State had chosen to establish two separate procedures, one after the other, for examining asylum applications and subsidiary protection applications, it remained "important that the applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures." Given that the nature of refugee

protection and "subsidiary protection status are different", it would not be enough to simply rely on any hearing up to that point or documentation thereto supplied. At paragraph 95, the Court stated:

> …however, in the case of a system such as that established by the national legislation at issue in the main proceedings, a feature of which is that there are two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, it is for the national court to ensure observance, in each of those procedures, of the applicant's fundamental rights and, more particularly, of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection.

30. The meaning of this was unclear. In the *MM* case, applying that judgment, Hogan J ruled at paragraph 47, that in order "for the hearing before the Minister to be effective in the sense understood by the European Court of Justice", an applicant would be entitled to comment on any adverse credibility finding, be given a fresh opportunity to revisit matters bearing on subsidiary protection, and be given an opportunity for a fresh assessment of his or her credibility. This ruling was no more than an application of what the changed legal situation seemed to demand. Prior to this ruling of the Court of Justice of the European Union, the legal requirement for a fresh hearing when a subsidiary protection application was made following a failed application for refugee status was summarised by Cooke J in *ND v Minister for Justice and Law Reform* [2012] IEHC 44. Cooke J, at paragraph 14, had therein held that a requirement on the respondent Minister "to reconsider the same facts or events and decide whether they should be considered plausible or credible in the light of explanations given in the application for subsidiary protection" would be to effectively "convert an application for subsidiary protection into a form of a second appeal against the refusal of a declaration of refugee status." This, the judge stated at paragraph 15, would "lead to an inherently contradictory result that in a case where an asylum claim based on past persecution" had been rejected on credibility grounds, the challenge "to those findings made in an application for subsidiary protection would require the Minister to decide not whether the applicant was eligible for that protection but whether the applicant was a refugee." An issue that arose was as to the extent of such rights and whether they were applicable in every circumstance where a person had failed in an application for refugee status on credibility grounds. In other words, where an applicant gave an account of persecution or of being subjected to violence in their country of origin which was simply disbelieved, the question was whether a full oral hearing had to be held in every case, or whether a written procedure might suffice.

31. Following a further reference to the Court of Justice of the European Union, this

time by this Court on 24 November 2014, in the *MM* case, the question was asked:

> Does the "right to be heard" in European Union law require that an applicant for subsidiary protection, made pursuant to Council Directive 2004/83/EC, be accorded an oral hearing of that application, including the right to call or cross-examine witnesses, when the application is made in circumstances where the Member State concerned operates two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection, respectively?

32. The nature of the right to be heard might call for either a written procedure or an oral procedure. The Court of Justice answered that question by stating that this was dependent on the circumstances. It would be necessary, according to paragraphs 49-50 of the judgment, to arrange an interview:

> …if the competent authority is not objectively in a position — on the basis of the elements available to it following the written procedure and the interview with the applicant conducted when his asylum application was examined — to determine with full knowledge of the facts whether substantial grounds have been shown for believing that, if returned to his country of origin, he would face a real risk of suffering serious harm, and whether he is unable, or, owing to such risk, unwilling, to avail himself of the protection of that country.

33. The purpose of such an interview would be to allow "the competent authority to question the applicant regarding the elements which are lacking for the purpose of taking a decision on his application". In essence, this must refer to the risk of serious harm resulting not from persecution, but from a general state of lawlessness and violence within the country of origin. This is made apparent from paragraph 51 of the judgment:

> An interview must also be arranged if it is apparent — in the light of the personal or general circumstances in which the application for subsidiary protection has been made, in particular any specific vulnerability of the applicant, due for example to his age, his state of health or the fact that he has been subjected to serious forms of violence — that one is necessary in order to allow him to comment in full and coherently on the elements capable of substantiating that application.

34. Answering the question posed by the Supreme Court, the Court of Justice of the European Union ruled:

> The right to be heard, as applicable in the context of Council Directive 2004/83/EC of 29 April 2004 on 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, does not require, as a rule, that, where national legislation, such as that at issue in the main proceedings, provides for two separate procedures, one after the other, for

> examining applications for refugee status and applications for subsidiary protection respectively, the applicant for subsidiary protection is to have the right to an interview relating to his application and the right to call or cross-examine witnesses when that interview takes place.
>
> An interview must nonetheless be arranged where specific circumstances, relating to the elements available to the competent authority or to the personal or general circumstances in which the application for subsidiary protection has been made, render it necessary in order to examine that application with full knowledge of the facts, a matter which is for the referring court to establish.

35. Thus, it would seem that it is not required "as a rule" in a bifurcated system, such as that operated in this jurisdiction until recently, that there should be two separate procedures which involve "the right to an interview relating" to an applicant's claim that he or she is entitled to subsidiary protection.

36. The question as to an entitlement to an oral procedure on applying for subsidiary protection after there has been, as in this case, two prior oral procedures concerning the circumstances giving rise to a claim for refugee status, is said by the Court of Justice to be dependent upon any claim of "specific vulnerability of the applicant, due for example to his age, his state of health or the fact that he has been subjected to serious forms of violence". While this does not necessarily indicate a definitive statement of the categories involved, it is a guide to examining whether there are "personal or general circumstances" which need to be brought out by way of an oral hearing.

37. Here, there were no such circumstances. The applicant mother indicated a claim which fell down on analysis in terms of the belief which any reasonable person might hold as to whether what she asserted was credible. There is nothing to suggest that a further interview, following the interview that had already taken place and the appeal hearing, might have suggested anything different or further that required another oral procedure. Were such to be required, the place to request it would have been in the letter responding to that of the respondent Minister seeking submissions as to why a deportation order should not be made. That was not done. Even still, it is important to examine such documents to see whether it might reasonably give rise to the necessity for another oral interview on the basis of what is asserted. In this case, at least, that cannot be asserted.

Other arguments

38. Whether in writing or orally, other arguments have been made including the entitlement of a general right of appeal of any administrative or quasi-judicial decision, arising under the Constitution. While some such appeals arise, it often appears randomly or by way of reflection as to the nature of the importance involved in such decisions, embracing such disparate activities as the refusal of a driving licence and a practical driving test along with rulings under the Social Welfare

Consolidation Act 2005, there has been insufficient argument on this issue to attract a ruling. This Court has already ruled that in the circumstances of this particular case, there is an effective remedy under Article 47 of the Charter of Fundamental Rights of the European Union. It is also hard to see it as potentially convincing that any greater rights can derive from an account of alleged violence found not to be credible by virtue of a requirement to make such a decision *ex nunc*, meaning from this point in time, under Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection. Here, the argument advanced was that the right to an effective remedy, under a Directive which Ireland has opted out of, includes a duty under Article 46 to carry out "a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance."

39. What is important in this analysis is the careful scrutiny of the case made by the applicants, the lack of any personal documentation to support it, its rejection by two tribunals after oral hearings and the reiteration of the same case, albeit with extra material in relation to the alleged corruption inherent in the country of origin's police force, when the applicants sought leave to remain on humanitarian grounds and applied to the respondent Minister for subsidiary protection.

Result

40. In the result, the judgment of Cooke J at first instance should be affirmed.