Judgments

Judgment Title: M.M -v- Minister for Justice & Anor

Neutral Citation: 2013 IEHC 9

High Court Record Number: 2011 8 JR

Date of Delivery: 01/23/2013

Court: High Court

Composition of Court:

Judgment by: Hogan J.

Status of Judgment: Approved

Neutral Citation No: [2013] IEHC No. 9

THE HIGH COURT

[2011 No. 8 J.R.]

BETWEEN

M. M.

APPLICANT

AND

MINISTER FOR JUSTICE AND LAW REFORM, IRELAND

AND THE ATTORNEY GENERAL (No.3)

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 23rd January, 2013

1. One of the singular features of the Irish system of international protection for refugees is the bi-furcated nature of our system governing applications for asylum on the one hand and subsidiary protection on the other. This means that an applicant for international protection must first apply for asylum and it is only in the event that this request is refused that the issue of subsidiary protection then arises. While it is true, of course, that asylum and subsidiary protection are distinct and different forms of international protection, the material and arguments relied on by

the applicant in support of the application will often overlap significantly in both cases.

2. It should also be recalled that whereas the asylum application is dealt with in the first instance by the Office of the Refugee Application Commissioner, with an appeal to the Refugee Appeal Tribunal, the application for subsidiary protection is made to the Minister for Justice, Defence and Equality. There is no right of appeal in this latter instance from the administrative decision of the Minister.

3. The question which has accordingly arisen in these proceedings is the extent to which the Minister is oblige to give an applicant a separate opportunity to be heard in respect of the subsidiary protection application in view of the decision of the Court of Justice of 22nd November, 2012, in Case C-277/2012, *MM v. Minister for Justice, Equality and Law Reform*. This judgment followed a reference which was made by this Court pursuant to Article 267 TFEU in the wake of the first judgment in this case (*MM v. Minister for Justice, Equality and Law Reform* [2012] IEHC 547) delivered by me on 18th May, 2011. Following the delivery of that judgment of the Court of Justice, a further hearing took place on the 20th December, 2012. Having reserved judgment, I then invited the parties to address me on five specific questions which seemed to me to arise and a further hearing took place on 11th January, 2013.

4. As will shortly be seen, the critical issue which is now before me concerns the determination of what the Court of Justice actually decided in the judgment on that reference and what – if any- are the implications of that judgment when applied to the facts of the present case. But before proceeding to elaborate on this point, it is necessary first to sketch out the facts of the facts and, specifically, to delineate the evolution of the arguments which bear directly or indirectly on the fair procedures question.

The background facts

5. The applicant is a Rwandan national of Tutsi ethnicity who arrived here in 2006 for the purposes of pursuing a course of post-graduate legal studies at the National University of Ireland, Galway. When his student visa expired in April, 2008 after his graduation, Mr. M. then applied for asylum in the following month. He contended that following his graduation as a law student at the University of Rwanda in 2003, he was directed by the Rwandan authorities to work at the level of Staff Sergeant in the offices of the military prosecutor. Mr. M. stresses the fact that the authorities *required* him to take up this position, so that he had little or no option in the matter, whereas the Tribunal member in her decision had referred to the fact that Mr. M. had been "offered" a post in the office of military prosecutor.

6. In this regard it may be observed that Mr. M. had previously done research work as an undergraduate law student in Rwanda into the legal framework governing the investigation of the Rwandan genocide in 1994. He maintained that his effective conscription into the office of military prosecutor was an attempt to silence him and to prevent him from divulging information regarding the prosecution (or, as the case may be, the non-prosecution) of offences relating to the genocide. The applicant's claim that he had a well founded fear of persecution if returned to Rwanda by reason of these events was, however, rejected by both the Office of the Refugee Application Commissioner and the Refugee Appeal Tribunal.

7. In its decision of 28th October, 2008, the Tribunal rejected the applicant's claim on general credibility grounds, saying that it was difficult to believe that "the applicant would be offered a position as a prosecutor if he was considered a threat or nuisance to the authorities". It was also noted by the Tribunal member in her decision that the applicant had left Rwanda on a number of occasions in 2005.

Furthermore, the fact that the applicant did not make an application for asylum shortly after his arrival in Ireland in September, 2006 was also a factor which was found to be inconsistent with a well founded fear. The decision of the Tribunal was never challenged in judicial review proceedings. It may be noted that whereas the applicant had the benefit of a personal interview before the Office of the Refugee Applications Commissioner, the appeal before the Tribunal was in writing only.

8. In that latter regard, it may be observed that in its decision of 30th August, 2008, the Commissioner invoked s. 13(6)(c) of the Refugee Act 1996 (as amended) which provides that an oral hearing before the Tribunal will be refused where the Commissioner forms that the applicant "without reasonable cause failed to make an application [for asylum] as soon as reasonably practicable after arrival in the State."

9. The Commissioner evidently considered that it was appropriate to invoke the provisions of this sub-section given that Mr. M. only applied for asylum in May 2008, some 18 months following his first arrival in the State and shortly after his student visa had expired in April, 2008.

10. By letter dated the 8th December, 2008, the Minister notified Mr. M. that his asylum application was being rejected and that it was proposed to make a deportation order against him. That letter also informed him that he could make an application for subsidiary protection and invited him, should he think well of it, to submit any further information in support of his contention that he would suffer serious harm if he were to be returned to Rwanda.

11. The applicant then made an application on 31st December, 2008, for subsidiary protection. In that application it was stated that Mr. M. faced the real risk of "serious harm" within the meaning of Article 2 of Directive 2004/83/EC ("the Qualification Directive") by reason essentially of the same grounds which had already been advanced and rejected in the course of the asylum application. While the application for subsidiary protection was supplemented by the supply of further material by the applicant's legal advisers in support of the application on 15th July, 2009, and 6th August, 2010, the Minister ultimately rejected the application by a decision dated 24th September, 2010.

12. The applicant then challenged the validity of that decision in judicial review proceedings. This Court (Cooke J.) grant the applicant leave to apply for judicial review and at the hearing before me in April, 2011 the principal question which arose was whether the second sentence of Article 4(1) of the Qualifications Directive ("In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application") imposed a duty on the Minister to supply an applicant with a copy of any draft decision adverse to the applicant for comments prior to its adoption.

13. Although this point had been rejected in a number of earlier decisions of this Court (see, *e.g, Ahmed v. Minister for Justice, Equality and Law Reform*, 24th March, 2011), in my judgment in *MM (No.1)* delivered on 18th May, 2011, I decided to make a reference to the Court of Justice pursuant to Article 267TFEU concerning the interpretation of Article 4(1) in light of certain comments of the Dutch Council of State which seemed to support the applicant's case in a judgment delivered in July, 2007 which had been brought to my attention. In the course of my own judgment, I had, however, referred to the fact that the Minister had relied on up-to-date country of origin information concerning Rwanda which had not been brought to the applicant's attention. I had nevertheless rejected any arguments based on fair procedures for the reasons set out at paras 19-20 of that judgment:

> "19. The present case is, if anything, weaker than *Ahmed*. Unlike that case - where the security situation in Iraq had improved in the period between the first reports submitted by the applicant and the up-dated reports relied on by the decision-maker - there has been no appreciable change in the general political or security situation in Rwanda, at least so far as period between 2007 and 2010 is concerned. Thus, for example, in his application for subsidiary protection in December 2008, the applicant submitted country of origin information from 2008 (including the US State Department country report for 2007 which had been published in March 2008), albeit that this was supplemented with some further up-dated information in a letter of 6th August, 2010. Much of this material centred on the Rwandan judicial and prosecution systems.
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> 20. It is perfectly true that the decision-maker dealing with the subsidiary protection application relied on material which had been published in 2010, including a US State Department report on Rwanda for 2009 which had been published in March, 2010. While there is no doubt but that this country of origin information shows serious shortcomings in the Rwandan judicial, prosecutorial and policing systems along with serious human rights abuses, it cannot be said that, so far as the applicant's own circumstances are concerned, the differences between the various reports are hugely material. It must be here recalled that at the heart of the applicant's request for international protection - whether it be asylum or subsidiary protection - is that fact that the Refugee Appeal Tribunal ruled adversely to this claim on credibility grounds. Neither this decision nor the earlier decision of the Refugee Applications Commissioner have ever been impugned by the applicant in judicial review proceedings. In these circumstances, it cannot be said that there has been any breaches of fair procedures by the Minister. Besides, the applicant must be taken to be aware of the fact that the Minister is in principle permitted by the 2006 Regulations to rely on information of this kind which is generally in the public domain, given that Article 4(3)(b)(ii) expressly permits the Minister to have regard to "such other information relevant to the application as is within the Minister's knowledge.""

14. Following the making of that reference, I subsequently granted the applicant an interlocutory injunction staying his deportation pending the outcome of the decision of the Court of Justice: see *MM v. Minister for Justice, Equality and Law Reform (No.2)* [2011] IEHC 346.

The decision of the Court of Justice in Case C-277/11 MM

15. The Court of Justice delivered its judgment in Case C-277/11, *MM. v. Minister for Justice, Equality and Law Reform* on 22nd November 2012. There is no doubt whatever but that the Court of Justice rejected the applicant's argument concerning the interpretation of Article 4(1), as it held that the duty of co-operation did not extend so as to require the decision maker to supply the applicant with a draft of any possible adverse decision for comment prior to its formal adoption. In that respect, therefore, the applicant's case based on Article 4(1) must stand dismissed.

16. However, the issue which now acutely arises concerns the second part of the Court's judgment which runs from paras. 75-95. Rather unusually, the Court went beyond the scope of the referred question because it considered that "this case raises more generally the question of the right of the foreign national to be heard in the course of examination of his second application" for subsidiary protection. The Court went on (at para.76):

> "In order to provide the referring court with a useful answer, it is thus important to determine whether, in relation to a situation such as that in the main proceedings – a feature of which is that there are two separate procedures, one after the other, for examining asylum applications and subsidiary protection applications respectively – it is unlawful not to hold a further hearing of the applicant in the course of examination of the second application and prior to rejection of that application on the ground that, as both the High Court and Ireland have contended, he has already been heard during the procedure relating to his first application (for refugee status)."

17. The real question here is what is meant by the words "a further hearing". (While only the English language version of the judgment is authoritative, it may be noted that the French version uses the term "une nouvelle audition" and the German "….erneut angehört wird…"). Specifically, does this mean that the Minister must hold some form of oral hearing or conduct a personal interview of the applicant for subsidiary protection (as Mr. M. contended at the second hearing before me following the decision of the Court of Justice), because it is common case that the applicant was, of course, permitted to advance in his case in writing and did so? A further consideration here is that in the course of my judgment of 18th May, 2011, I referred both expressly and by implication to the existing written procedure involving an application for subsidiary protection which had been followed in this case and which, of course, the Minister was obliged to follow. Inasmuch, therefore, as I had (impliedly) rejected the necessity for a hearing, it was the necessity for some form of oral hearing on the application for subsidiary protection, although, candidly, that issue was never directly raised at that stage of these proceedings.

18. Returning now to the judgment of the Court of Justice, the procedures prescribed in respect of applications for asylum contained in Directive 2005/85/EC ("the Procedures Directive") were then set out (at paras. 77-78). The Court noted that Article 12 and Article 13(3) of the Procedures Directive provide that:

> "before a decision is taken by a responsible authority, the applicant for asylum is to be given the opportunity of a personal interview on his application under conditions which allow him to present the grounds for the application in a comprehensive manner."

19. Yet the Court also acknowledged that the Procedures Directive does not apply to the procedures governing applications for subsidiary protection in Ireland, since it only applies to those Member States who have established a single procedure in respect of applications for subsidiary protection. The Court continued (at para. 80):

> "That is not, however, the situation in Ireland, which has chosen to establish two separate procedures for examining asylum applications and subsidiary protection applications respectively, it being possible to make the second application only after the first has been rejected. In those circumstances, Irish law requires observance of the safeguards and rules set out in Directive 2005/85 solely in relation to the examination of applications for refugee status. With regard more

> particularly to the right of the applicant to be heard before a decision is adopted, the High Court has stated in its order for reference that, according to national case-law, it is not necessary to observe that procedural requirement when dealing with an application for subsidiary protection made following rejection of an asylum application, given that the applicant will already have been heard in the examination of his asylum application and given that the two procedures are closely linked."

20. Next, having referred to some well known case-law regarding the ambit of the general right to be heard as a dimension of Union law and by reference to Article 41(2) of the Charter (which provides that every citizen has the right to be heard before any individual decision which would affect him or her adversely is taken by an institution, body, office or agency of the Union), the Court held (at paragraph 89) that:-

> "the right, thus understood, of the applicant for asylum to be heard must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System."

21. The Court then continued by holding (at paras. 90-95):-

> "90. In that regard, the Court cannot accept the view put forward by the referring court and Ireland that, where – as in Ireland – an application for subsidiary protection is dealt with in a separate procedure, necessarily after the rejection of an asylum application upon conclusion of an examination in which the applicant has been heard, it is not necessary for the applicant to be heard (…«il ne serait pas nécessaire de procéder á une nouvelle audition…»)(»….bei der Prufüng des Antrags auf subsidiaren Schutz erneut anzuhören…nicht erforderlich sein soll…«) again for the purpose of considering his application for subsidiary protection because the formality of a hearing in a sense replicates the hearing which he has already had in a largely similar context.
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> 91. Rather, when a Member State has chosen to establish two separate procedures, one following upon the other, for examining asylum applications and applications for subsidiary protection, it is important that the applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures.
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> 92. Furthermore, that interpretation is all the more justified in a situation such as that of the case in the main proceedings since, according to the information provided by the referring court itself, the competent national authority, when stating the grounds for its decision to reject the application for subsidiary protection, referred to a large extent to the reasons it had already relied on in support of its rejection of the asylum application, although, under Directive 2004/83, the conditions which must be fulfilled for the grant of refugee status and for the awarding of subsidiary protection status are different, as is the nature of the rights attaching to each of them.
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> 93. It should be added that, according to the Court's settled case-law, the Member States must not only interpret their

national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law (see Joined Cases C-411/10 and C-493/10 N.S. and Others [2011] ECR I-0000, paragraph 77).

94. It is in the light of that guidance as to the interpretation of EU law that it will be for the referring court to determine whether the procedure followed in the examination of Mr M.'s application for subsidiary protection was compatible with the requirements of EU law and, should it find that Mr M.'s right to be heard was infringed, to draw all the necessary inferences therefrom.

95. In the light of all the foregoing considerations, the answer to the question referred is that:-

> – the requirement that the Member State concerned cooperate with an applicant for asylum, as stated in the second sentence of Article 4(1) of Directive 2004/83, cannot be interpreted as meaning that, where a foreign national requests subsidiary protection status after he has been refused refugee status and the competent national authority is minded to reject that second application as well, the authority is on that basis obliged – before adopting its decision – to inform the applicant that it proposes to reject his application and notify him of the arguments on which it intends to base its rejection, so as to enable him to make known his views in that regard;
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> – 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."

22. What conclusions, therefore, are to be drawn from these passages of the judgment? It must be recalled that my judgment of 18th May, 2011, did not address

the general question of fair procedures at subsidiary protection stage since that question - as distinct from any *specific* procedural obligation imposed on the Minister by Article 4(1) of the Qualification Directive - was never argued before me at that point. Again, however, inasmuch as my judgment (impliedly) rejects the right to a hearing at subsidiary protection stage, it is the right to some form of oral hearing.

23. All of this is, I think, of some importance in understanding the import of the second part of the court's judgment. After all, the opinion of Advocate General Bot (which had been delivered on 26th April, 2012) had described the written procedure which was actually followed in respect of Mr. M.'s subsidiary protection application in complete detail and with pellucid clarity: see here, in particular, paras. 96-106 of that opinion. In these circumstances, it cannot realistically be contended that the Court of Justice was somehow unaware of the fact that a separate written procedure had been followed with regard to Mr. M.'s subsidiary protection application. In any event, the entire argument based on the Article 4(1) issue had been directed to one specific aspect of that particular written procedure.

24. In this context it may be observed that the Court had earlier noted (at para. 35) that:

> "There is no provision in the 2006 Regulations for the applicant for subsidiary protection to be heard in the course of examination of his application" ("d'une telle protection subsidiaire est entendu")("…seines Antrags angehört wird…")

25. It must be accepted that this paragraph might be thought to imply that the Court was here referring of necessity to an oral hearing, because, of course, the Regulations do provide for a hearing (albeit by means of a written procedure) inasmuch, for example, as Article 5(1)(b) of the 2006 Regulations imposes an obligation on the decision maker to consult and consider all relevant information supplied by the applicant.

26. At the same time, the judgment of the Court of Justice when read in its totality cannot be interpreted as meaning that an oral hearing would be routinely required at subsidiary protection stage. One imagines that if this had been required, then the Court of Justice would have said so in direct and unambiguous terms. Nor was any direct analogy drawn between the present case and the requirement for a personal interview in the case of applicants for international protection prescribed by the Procedures Directives. Moreover, the case-law referred to in the judgment of the Court of Justice – ranging from Case 17/74 *Transocean* Marine Paint [1974] ECR 1063 to Case C-27/09P *Peoples' Mujahedin Organisation of France* [2011] E.C.R. I-0000 – all deal with the *general* right to fair procedures as a general principle of EU law. None of this case-law deals with the right to an *oral* hearing as such.

27. In this regard, while English remains the authoritative text of the judgment, I was invited nonetheless to consult certain other language versions with a view to assisting in an understanding of what the judgment actually decided. It is certainly true that, for example, the words used in the French and German versions of the judgment ("une nouvelle audition", "erneut anzuhören") can – depending on the context – suggest that the hearing in question must be an oral one, but in truth these words (and similar cognate words) suffer from the same latent ambiguity as English words such as "to hear" and "hearing" in that they can also be used to describe a written procedure (*e.g.*, "schriftliche Anhörung" in German) as well as an oral hearing. In these circumstances, I do not think that consulting other language versions of the judgment (which, in any event, are not authoritative) can assist in

resolving these ambiguities.

28. It is true that at the renewed hearing of 11th January 2013 there was much discussion of whether the Court of Justice had been correct in ascribing to me the views which it did at paragraphs 76, 80 and 90 of the judgment regarding the necessity for a hearing at subsidiary protection stage. Counsel for the applicant, Mr. O'Shea, accepted that I had not said this in express terms in either my judgment or the order for reference. He rather urged that the Court of Justice had been influenced by a series of decisions of this Court which had rejected the necessity for an oral hearing, some of which indeed post-dated the order for reference of June 2011, but on which he had relied at the oral procedure in Luxembourg, such as*Oziegbe v. Minister for Justice and Equality*, High Court, 14th December 2011 and *Jayeola v. Minister for Justice and Equality*, High Court, 3rd February 2012. Mr. O'Shea suggested that the reference to the views of the High Court in the judgment of the Court of Justice should accordingly be understood as referring to the views of the High Court collectively as reflected in a series of judgments dealing with the subsidiary protection procedures.

29. Counsel for the Minister, Mr. Conlan Smyth, respectfully – but firmly – suggested that the Court of Justice had fallen into error in ascribing the views which it did to me. He suggested, however, that as the Court could not have – and did not hold – that there was any entitlement to an oral hearing, this had no material consequence for the present case.

30. For my part, just as the Court of Justice will not seek to challenge or in some way look behind findings of fact made by the national court in the context of an Article 267 TFEU reference (see, e.g., Case C-435/97 *World Wide Fund v,. Autonome Provinz Bozen* [1999] ECR I-5613, paras. 31-33), I consider that a similar principle should operate in reverse. It would not, I think, be seemly or appropriate for this Court to challenge – whether directly or indirectly – the analysis of my judgment or the order for reference which was conducted by the Court of Justice. The duty of loyal co-operation between the national courts and the Court of Justice requires no less.

31. The Court of Justice was, however, evidently troubled by the aspects of the procedure actually followed in this case, so much so that it went out of its way to give guidance to this Court on this very question. The judgment specifically emphasises the fact that the asylum and subsidiary protection procedures presently contained in Irish law are distinct and different. The logical corollary of this is that under our bi-furcated system the subsidiary protection application must be considered distinctly and separately from the asylum application. This in turn means that the Minister must decide the subsidiary protection issue without any reliance on the prior reasoning contained in the asylum application insofar as this otherwise may be taken effectively to preclude an applicant for subsidiary protection re-opening certain issues at that stage or inasmuch as it creates any quasi-estoppel arising as against such an applicant by reason of a failure to challenge an adverse asylum application in separate judicial review proceedings, at least in the absence of an effective hearing where the applicant was given an opportunity afresh to re-visit these issues; where these matters were expressly put to the applicant by the decision-maker and where the decision-maker independently made a fresh decision on the applicant's credibility and other relevant issues.

32. The conclusion is underscored by the Court of Justice's express reference (at para. 92 of the judgment) – with evident disapproval – to the fact that the Minister had relied on the adverse credibility findings made in the asylum application as a ground for rejecting the subsidiary protection application. Here it may be

appropriate to discuss two recent important decisions of this Court dealing with the relationship between asylum on the one hand and subsidiary protection on the other,*Debisi v. Minister for Justice and Law Reform* [2012] IEHC 44 and *Barua v. Minister for Justice and Equality* [2012] IEHC 456.

33. In *Debisi* the applicant, a Nigerian national, had first claimed asylum based on a sequence of events which was said to have culminated in the killing of a friend of the police. The applicant contended that his friend's father – a powerful and corrupt Nigerian politician – held him responsible for the death and he feared for his life. At first instance the application was rejected by the Office of the Refugee Applications Commissioner as lacking credibility. An appeal against the Tribunal decision was subsequently withdrawn on the ground that the alleged threat to the applicant came from a private source and did not come within a Convention ground.

34. The applicant then made an application for subsidiary protection which the Minister rejected in view of the credibility findings made on the asylum claim. This decision was then challenged in judicial review proceedings on the ground that there had been "no engagement" by the Minister with the representations made in the subsidiary protection application which sought to address each of these adverse credibility findings.

35. Cooke J. rejected this argument, saying:-

> "11. Accordingly, in the subsidiary protection application it was sought to challenge the negative findings on credibility in the s. 13 Report and to invite the respondent to determine that application on the basis of the explanations then offered as to why he should have been believed. In the judgment of the Court, these arguments are not well founded because they fail to appreciate the essential procedural character of the international protection process which forms the basis of the common asylum system of the European Union……
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> 13. Although Regulation 4 (1)(a) of the 2006 Regulations requires a deportation proposal made under s. 3(3) of the Act of 1999, to invite a failed asylum seeker to make a separate application for subsidiary protection when the refusal of refugee status under s. 17(1) has been decided, the process remains, in the judgment of Court, a continuing and coherent examination of the status of the applicant in international and European Union law in which the Minister as the decision maker in respect of subsidiary protection is entitled – and indeed obliged – to take into account the findings made in the asylum process and which have of course been accepted by him as the basis for his refusal of the declaration under s. 17(1) of the Act of 1996.
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> 14. The scheme of the 2006 Act when taken in conjunction with the provisions of the Acts of 1996 and 1999 in complementing the asylum process, presupposes that the application for subsidiary protection will have been examined in the first instance during the asylum process before it comes to be considered under the Regulations by the Minister. It follows, in the view of the Court, that where the s. 13 Report (or for that matter the decision of the Tribunal on appeal) has found that an asylum seeker's claim is implausible or lacks

credibility such that the events described or the facts relied upon are considered not to have happened or not to have involved the applicant, there is no obligation on the Minister to reconsider the same facts or events and to decide whether they should be considered plausible or credible in the light of explanations given in the application for subsidiary protection; at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers. To require the Minister to do so would effectively convert an application for subsidiary protection into a form of a second appeal against the refusal of a declaration of refugee status.

15. It would also in the view of the Court, lead to the inherently contradictory result that in a case where an asylum claim based on past persecution for a specific Convention reason (race, religion, political opinion etc.) had been rejected on grounds of lack of credibility as to the events or facts relied upon, a 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. It is a precondition of the admissibility of an application for subsidiary protection that the applicant is not a refugee. (See the definition of "person eligible for subsidiary protection" in Article 2 of the Qualifications Directive (2004/83/EC) and Regulation 2(1) of the 2006 Regulations.)

16. It is nevertheless a necessary consequence of the legislative choice made to implement the provisions for subsidiary protection without a unified procedure before a single decision-maker and to invite the failed asylum seeker to make a distinct application that instances, even if rare, may arise in which an applicant will seek to rely upon a risk of harm from a source not previously considered in the asylum process. In such cases it will fall to the decision-maker in the subsidiary protection process to assess that claim as it is made and, where its assessment requires an evaluation of the personal credibility of the applicant, it may well be that the principle of fair procedures will require the decision-maker to interview the applicant for that purpose. Nothing in the 2006 Regulations precludes that being done. This however, is not such a case because the application for subsidiary protection is based upon an alleged fear of risk of serious harm and it is based upon the same source, person and events as had previously been rejected as incredible in the asylum process."

17. Quite apart from these considerations, however, the arguments advanced in the present application for subsidiary protection in support of the claim for reconsideration of the credibility issue were, in the judgment of the Court, essentially contradictory. In effect, the material put forward for this purpose relied upon quotations from country of origin information relating to religious riots in northern Nigeria at the relevant time together with newspaper reports designed to demonstrate the status, power, influence and notoriety of the

> deputy governor in question, including his alleged involvement in particular episodes of threats, intimidation, criminal violence against political opponents and corruption. This material is pointed to as corroboration of the validity of the applicant's fear of the deputy governor. The point made in the s. 13 report is all the more telling, however, because if such extensive material can be accessed to demonstrate the malign influence of the deputy governor in this way, it is all the more implausible that when the deputy governor's own son is allegedly murdered either by the applicant or by the police at the checkpoint, no trace whatsoever can be found of any report of that event in Nigerian news media. If his other malevolent activities are of such interest to the press it is somewhat unusual that the press has no apparent interest in the normally newsworthy event of the alleged killing of a prominent deputy state governor."

36. Cooke J. then set out certain factual details which suggested that the claims which had been advanced were inherently contradictory. Cooke J. then continued:-

> "18. In the judgment of the Court, therefore, this assertion that the Minister was obliged to reassess the issue of the applicant's personal credibility is unfounded and ignores both the scheme embodied in the provisions of the Refugee Act 1996, as complemented by the European Community (Eligibility for Protection) Regulations 2006, and the nature of the issue which faces the protection decision makers in these circumstances. That issue is not whether an individual identified as the source of the threat of serious harm is shown in country of origin information to be a notorious "godfather" figure in the way described. The issue is whether, in the absence of any corroboration of the applicant's own verbal assertions, the applicant is to be believed in claiming that he himself was the target of similar threats or violence from the individual in question. The decision-maker must ask the question whether the applicant is to be believed or whether this is an instance where an applicant, knowing of the verifiable reputation of the alleged source of serious harm, is opportunistically seeking to exploit it in order to create for himself a credible scenario which supports his claim for protection.
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> 19. The matters advanced in the letter of the 3 August, 2010, as the basis for the subsidiary protection application by way of challenge to the credibility findings in the s. 13 report, are in reality an elaboration of the same facts and events relied upon in the asylum claim and at the s. 11 interview. In effect the Minister is being asked to reconsider the issue of credibility and come to a different conclusion.
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> 20. In the judgment of the Court, this is not the function of the respondent when dealing with an application for subsidiary protection which is based on the same facts and events considered and determined in the s. 13 report (or for that matter in a Tribunal appeal decision) and which the Minister has accepted as the basis for the decision refusing a declaration of refugee status under s. 17(1) of the 1996 Act. If

> findings of fact, including findings of lack of credibility, are to be challenged as has been sought to be done in this case, that challenge must be made by way of appeal to the Tribunal. Where personal credibility is in dispute, it is by means of the independent assessment of the Tribunal member at an oral hearing that the dispute falls to be resolved in the scheme of the 1996 Act and the 2006 Regulations. This is so in the judgment of the Court, even in a case in which it is accepted that the facts and events relied upon, will not establish the existence of a Convention nexus even if they are found to be credible.
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> 21. Accordingly, although Ireland is the only Member State to maintain an international protection procedure in separate stages for subsidiary protection and for the asylum process, it is nevertheless appropriate in the view of the Court, to construe and apply the arrangements of the 1996 Act, together with the 2006 Regulations, so far as is consistent with the wording of those provisions, so as to give effect to subsidiary protection as a status which complements refugee status by providing an additional form of international protection against serious harm to an applicant who has established the reality of that risk, but from a cause or source which falls outside the terms of the Geneva Convention.
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> 22. It follows in the judgment of the Court, that where factual claims including those turning on credibility, have been examined and rejected in the asylum process and have formed the basis of the Minister's refusal of the declaration which is a precondition to the subsidiary protection application, the Minister cannot be compelled by the making of the latter application to reopen and reconsider the same facts, events and assertions. This can only be done, in the judgment of the Court, by means of the statutory appeal to the Refugee Appeals Tribunal."

37. If one proceeds from the premise that subsidiary protection is really just another step in the entire process of international protection, then the powerful analysis of Cooke J. contained in the passages just quoted from *Debisi* must be regarded as entirely compelling: see here also the comments made by Cross J. in a similar vein in *HM v. Minister for Justice, Equality and Law Reform* [2012] IEHC 176. It seems to me nevertheless that this reasoning must, however, be now regarded as having been superseded by the judgment of the Court of Justice in *MM*, precisely because that Court commenced the analysis contained in the second part of the judgment from an entirely different perspective, namely, that in a bi-furcated system such as ours, subsidiary protection must be evaluated separately and distinctly from the determination on the asylum application.

38. If that is so, then the considerations mentioned by Cooke J. – such as the need to avoid potentially inconsistent determinations or the understanding that all major credibility findings will made in the oral procedure attending the asylum claim (excepting perhaps entirely new evidence advanced during the subsidiary protection stage) – can no longer prevail.

39. Much of the analysis contained in the judgment of the Court of Justice in *MM* had, in any event, been anticipated by the very important decision of

MacEochaidh J. in *Barua v. Minister for Justice and Equality* [2012] IEHC 456. In that case the applicant was a Bangladeshi national who contended that he had ran foul of certain Islamic activists by reason of his involvement in a local organisation designed to advance the healthcare needs of women and children and had been falsely accused of wrongdoing to the local police. His application for asylum was dismissed on credibility grounds by the Refugee Appeal Tribunal, although in circumstances which prompted MacEochaidh J. to comment that "the matters in respect of which findings of lack of credibility were made" seemed to him to have been "marginal".

40. The applicant had, however, submitted certain documentary material by way of corroboration of his case. These documents included certification in basic health care, list of committee members of the organisation in question and a charge sheet and police report in relation to the false allegations. It was put to the applicant at the Tribunal hearing that fraudulent documents of this nature were freely available in Bangladesh, but he maintained that these documents were obtained directly from the police by his father. While the Tribunal referred to this fact in its decision, MacEochaidh J. commented that "no comment or finding was made thereon" and he noted that it had never been suggested that a complaint had been made against the applicant "in respect of false or fraudulently obtained documents".

41. The applicant then subsequently applied for subsidiary protection, but this application was rejected. The applicant's principal complaint - which MacEochaidh J. upheld - was that the decision maker had not given any reasons for rejecting the corroborating documentation as a basis for supporting the applicant's claim. But just as importantly, MacEochaidh J. rejected the argument that some form of quasi-estoppel operated as against the applicant to debar him from relying on certain arguments in the subsidiary protection process when he had not challenged the decision of the Tribunal. Noting that the applicant had been told that the subsidiary protection process was not an appeal against the asylum rejection, MacEochaidh J. observed that in those circumstances it would be unfair to hold findings made by the Tribunal in the asylum process against the applicant in the subsidiary protection process without at least giving him an opportunity to re-open these issues:

42. It is precisely these procedural issues which the Court of Justice must have had in mind when it made the comments which it did, especially at para. 92 of the judgment.

Application of these principles to the present case

43. In the light of the foregoing analysis, it is plain that the Minister's subsidiary protection decision cannot stand. It is true that the Minister made a general finding based on country of origin information that "although there have been incidents of violence and operations against [certain] groups", a "situation of armed conflict does not exist in Rwanda at present." He went on to find that the applicant had not demonstrated that he was "without protection" in Rwanda and rejected claims that he would be at risk of serious harm if returned there. These reasons were, however, general in nature and might be deployed in respect of a generalised claim that it was unsafe to return any applicant for subsidiary protection to Rwanda.

44. But this case does not turn on that generalised claim regarding the current political situation in Rwanda. It rather turns on a highly specific claim that *this* applicant would suffer serious harm by reason of *his* specific involvement in the military prosecutor's office and his access to sensitive information regarding the prosecution of genocide offences. So far as *that*claim is concerned, the Minister relied entirely on the reasons advanced by the Refugee Appeals Tribunal to reject the credibility of these claims and he made no separate and distinct findings of his

own on these critical questions. It was evidently this feature of the subsidiary protection procedure which so clearly troubled the Court of Justice.

45. I appreciate that in *NN v. Minister for Justice, Equality and Law Reform*, High Court, 28th November 2012, Clark J. observed that the Court of Justice's judgment in *MM* did not "represent any great departure from the law as it stands." I respectfully agree, but I think it is nonetheless clear that the decision of the Court of Justice may have many important practical implication for the present system of subsidiary protection.

Conclusions

46. In these circumstances, in the light of the guidance given by the Court of Justice on the reference, I must hold that the Minister failed to afford the applicant an effective hearing at subsidiary protection stage, *precisely* because he relied*completely* on the adverse credibility findings which had been made by the Tribunal in respect of the contention that Mr. M. would come to harm if he were returned to Rwanda by reason of his involvement in the office of military prosecutor and because he made no *independent and separate adjudication* on these claims.

47. In order for the hearing before the Minister to be effective in the sense understood by the Court of Justice in such circumstances, such a hearing would, at a minimum, involve a procedure whereby (i) the applicant was invited to comment on any adverse credibility findings made by the Refugee Appeals Tribunal; (ii) the applicant was given a completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection and (iii) involve a completely fresh assessment of the applicant's credibility in circumstances where the mere fact that the Tribunal had ruled adversely to this question would not in itself suffice and would not even be directly relevant to this fresh credibility assessment.

48. It is unnecessary at this juncture to consider the question of whether a separate oral hearing would ever generally be required at subsidiary protection stage. It probably suffices to say that there might well be many circumstances where such a hearing would be required if a credibility finding adverse to the applicant was to be made which was separate and distinct from that made during the asylum process: *cf.* here by analogy my own judgment in *Lyons v. Financial Services Ombudsman*[2011] IEHC 454 and the judgment of Cooke J. in *Debisi,* albeit that these comments were made only in the context of new information – not previously available in the asylum process – which was made available to the Minister in the course of the subsidiary protection process.

49. In arriving at this conclusion I acknowledge that this decision is likely to have significant – perhaps it would even be more accurate to say, far-reaching – consequences for the practical administration of the subsidiary protection scheme, at least as it has been operated in this State to date. It will certainly add new levels of complication, delay and cost to the existing bi-furcated system. Bearing in mind that other Member States operate a single integrated system combining asylum and subsidiary protection, these are matters which the Oireachtas may urgently wish to weigh and consider, not least having regard to the comments of Clarke J. in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 44 and those of MacEochaidh J. in *Barua*.

50. Nevertheless, since I must naturally apply the judgment of the Court of Justice and the guidance it has given me, it follows, therefore, that for the foregoing reasons I must quash the subsidiary protection decision of the Minister dated the 24th September, 2010 as rejected the applicant's claim.

Approved: Hogan J.