[2012]IEHC 251

MR JUSTICE COOKE
APPROVED TEXT

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 734 J.R.]

BETWEEN

W. A. [DRC]

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 25th day of June 2012

1. In the motion before the Court the applicant seeks leave to apply for judicial review of a decision of the first named respondent of the 1st April, 2011, refusing the applicant's application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006, ("the 2006 Regulations") and of a deportation order subsequently made in respect of the applicant on the 15th July, 2011.

THE ASYLUM PROCESS.

2. The applicant is a national of the Democratic Republic of Congo (DRC) who arrived in the State in November 2009, and claimed asylum. In a report dated the 8th March, 2010, under s. 13(1) of the Refugee Act 1996 (as amended) the Office of the Refugee Commissioner gave a negative recommendation upon the asylum application. This recommendation was based upon the primary conclusion that the account given by the applicant as the basis of his fear of persecution lacked credibility. The authorised officers also concluded that, were his claim considered

credible, internal relocation within the DRC might not be a viable option for him by way of protection.

3. On appeal the negative recommendation of the Commissioner was affirmed by the Tribunal in a decision of 30th June, 2010. The applicant's claim to a fear of persecution was based upon his membership of and activities in a political organisation called the MLC and particularly his involvement in a demonstration in March 2007, following the national elections when the President of the MLC, Bemba, was considered to have won, but the incumbent, President Kabila, refused to hand over power. He claimed that he had been arrested following the demonstration and was detained for nearly two years in a prison camp where he was interrogated and tortured. He claims he escaped only because his sister was able to sell a house and give part of the proceeds to an army general who arranged his escape and introduced him to a Nigerian who brought him to Ireland through the United Kingdom. In a detailed consideration of the evidence given by the applicant, the Tribunal member also concluded that, while there was country of origin information confirming that such demonstrations had taken place, the applicant's claim to have been involved, to have been detained for two years and to have escaped in the manner described, lacked credibility.

4. In response to the Minister's letter under s. 3 of the Immigration Act 1999, the applicant applied for subsidiary protection on the 6th September, 2010, and made representations for leave to remain by letter dated the 30th August, 2010.

THE GROUNDS FOR REVIEW

5. In the statement of grounds dated the 11th August, 2011, a total of thirteen grounds are relied upon, some of which are directed at the refusal of subsidiary protection and others at the deportation order, while some appear to be common to

both. As counsel for the applicant accepted when moving the application, a number of these grounds raising issues of law have already been the subject of a number of judgments of the High Court and cannot, accordingly, be considered to raise either an arguable case or a substantial ground (as the case may be) for the grant of leave to seek judicial review of the subsidiary protection and deportation decisions respectively.

6. Thus, grounds 1, 2 and 3 are based upon the proposition that there has been a defective transposition of Council Directive 2004/83/EC of the 29th April, 2004, ("the Qualifications Directive") by the 2006 Regulations in the failure to stipulate that the assessment of an application for subsidiary protection by the first named respondent should be made "in cooperation" with the applicant. This argument has been rejected in a series of judgments including, for example, *Mayie v. The Minister for Justice* (Unreported, Cooke J. High Court, 27th July, 2011); *N.O. v. Minister for Justice* (Unreported, Ryan J. High Court, 14th December, 2011) and *O.J. v. Minister for Justice* (Unreported, Cross J. High Court, 3rd February, 2012). Furthermore, although the proposition was considered unfounded by Hogan J. in the case of *M.M. v. Minister for Justice* (Unreported, High Court, 18th May 2011), he referred a question for preliminary ruling by the Court of Justice in what has become case C-277/11 *M.M. v. Minister for Justice*. In that case the opinion of the Advocate General was given on 26th April 2012 and, while this is obviously not the definitive ruling of the Court on the reference, it is a clear indication that "cooperation" as used in Article 4 of the Directive does not require that a draft of a refusal decision be furnished to an applicant for comment. This Court pointed out in the above judgment in *Mayie*, in appropriate circumstances the basic principle of *audi alteram partem* will always apply even in the absence of a mention of "cooperation" in the Regulations. In the

present case no particular point or issue has been identified by reference to the decision on subsidiary protection which would have attracted the application of that principle.

7. Grounds 4, 5 and 11, raise issues based upon the proposition that the procedure for adjudicating upon applications for subsidiary protection in this jurisdiction fail to provide an "effective remedy" to an applicant contrary to Article 47 of the Charter of Fundamental Rights and Freedoms of the European Union, Article 13 of the European Convention on Human Rights; that the absence of a "full appeal" against a refusal decision infringes the principles of equivalence and/or effectiveness in European Union Law and is contrary to provisions of Articles 34 and 40.3 of the Constitution.

8. Again, these arguments have been considered in further case law of the High Court. (See, *inter alia, B.J.S.A. v Minister for Justice* [2011] IEHC 381, *N.O. v Minister for Justice* [2012] IEHC 472, *M.A.A. v Minister for Justice* (Unreported, High Court, Bimingham J. 24th March 2011 and *V.N. [Cameroon] v Minister for Justice* [2012] IEHC 62).

9. Ground 10, is based upon the proposition that as the application for subsidiary protection had been made "without prejudice" no decision on the application should have been made or at least not made without forewarning, until "judgments were available in the cases of *Dokie* and *Ajibola*". The exact basis for this proposition is by no means clear. The cases referred to are *H.I.D. v. The Refugee Applications Commissioner and Others* and *B.A. v. The Refugee Applications Commissioner and Others* which were decided by this Court in judgments given on the 9th February, 2011. As such, the judgments are available. Insofar as there is any matter outstanding in those cases, it arises from the fact that for the purpose of ruling on an

application for a certificate to appeal those cases to the Supreme Court, this Court made a reference for preliminary ruling to the Court of Justice of the European Union, under Article 267 TFEU and that case is currently pending before the Court of Justice as Case C-175/11 *H.I.D.* and *B.A. v. Refugee Applications Commissioner and Others*. The questions raised for ruling before the Court relate to the use of an accelerated procedure in determining asylum applications made by Nigerian applicants and, secondly, the status of the Refugee Appeals Tribunal in Irish law for the purposes of Article 39 of Council Directive 2005/85/EC of the 1st December 2005.

10. The first of those questions has no bearing upon the present case as the applicant is not a Nigerian national and his asylum application was not dealt with in an accelerated procedure. The second question is also immaterial to the present case, because its relevance, if any, goes to the validity of the appeal decision of the Tribunal and not to the decisions sought to be challenged in this proceeding. No application for judicial review of the appeal decision of the Tribunal in this case was sought at the relevant time.

11. Ground 13, argues that the decision makers "have taken into account irrelevant considerations and have failed to take into account relevant considerations" but no particular considerations have been identified for this purpose. The ground is therefore wholly lacking in the particularisation of the alleged flaw necessary to constitute a basis for the grant of leave.

12. Ground 7, claims that the decisions to refuse subsidiary protection and to issue the deportation order "were not proportionate or reasonable". So far as concerns the subsidiary protection decision, the Court is of the view that an issue of proportionality cannot be said to arise. Subsidiary protection is not a privilege which is in the gift of the respondent to be accorded or denied at his discretion. A quasi-judicial decision

can be bad in law as unreasonable because it is disproportionate where the measure adopted or step taken by the decision maker goes clearly beyond what is necessary or justifiable in order to secure the particular objective or policy envisaged in the relevant legislation. (See for example in the judgment of Keane J. (as he then was) in *Radio Limerick One Limited v. I.R.T.C.* [1997] 2 I.L.R.M. 1 at p. 20 and the judgment of Murray C.J. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701). Subsidiary protection is a form of international protection which, like the status of refugee, accrues to an individual who is found to be in one of the situations coming within the definition of "serious harm" in the 2006 Regulations. The conditions which determine whether the applicant is in such a situation are either found to be fulfilled or not. The question of the proportionality of refusing recognition of the existence of the situation does not arise.

PRELIMINARY OBSERVATIONS.

13. The remaining grounds are directed in various ways at the content of the analysis made and the reasons given in each of the decisions and particularly in relation to the refusal of subsidiary protection at the manner in which reliance has been placed upon "country of origin information" in discounting the risk which the applicant claimed he would face if repatriated to the DRC. The Court will deal with the remaining grounds taken together for that reason. Before doing so, however, it is necessary to make some preliminary observations.

14. The Court entirely accepts that when the first named respondent is required to process very large numbers of applications invariably made in narrative form and often accompanied by substantial amounts of documentation and information, it is not only permissible and desirable but necessary, that there should be in place efficient procedures designed to ensure that each application is thoroughly examined and that

the decisions reached are consistent. Such a system may involve a degree of standardisation of the decision-making process including a similarity in the format and layout used in setting out the analysis of applications and the statement of reasons for the conclusions reached.

15. Where, however, large numbers of applications are made requiring quasi-judicial decisions and are dealt with systematically using a standard form of approach to analysis and reasoning, it becomes all the more important that decision-makers take care to ensure that a reliance upon the system does not result in sight being lost of the individual and particular circumstances of each application and in a consequent failure adequately to address details of the specific case being made by each applicant. Routine and repetition in administrative decision making, as in judicial adjudication, heightens the risk that inadequate regard may be had to the unique circumstance of the individual case. Where the routine involves the repeated answering, seriatim, of the same questions, there is a danger that the decision maker may, even inadvertently, slip into the habit of treating each question, condition or heading to be considered in isolation and fail to stand back and assess the overall basis and cogency of the case as made in the application and to examine the adequacy of the overall response given to those separate elements when taken as a whole.

16. The Court feels it is appropriate to make these preliminary observations because it appears to be a characteristic of the determinations made on applications for subsidiary protection that applications are analysed and assessed systematically by reference to the matters required to be examined under the various sub-headings of the 2006 Regulations. Thus, the format of the determination follows the structure of the headings of matters to be taken into account by the decision maker as set out in sub-paras. (a) – (e) of para. (1) of Regulation 5 followed by by paragraphs (2) and (3).

Invariably too in the experience of the Court, although the determination always commences with a summary of the application made under the heading "Serious Harm Claimed" it is frequently difficult to avoid the impression that decision makers treat the obligation to take into account each of the matters covered by the headings (a) – (e) as adequately discharged by having recourse to country of origin information alone. Extensive quotations from such sources can be set out followed by a conclusion phrased in general terms along the lines that the information shows that there "is a judicial system in place" or that "there is a functioning police force" without any direct reply given to the specific detail of the precise threat alleged.

THE REMAINING GROUNDS

17. In the present case, taking first the decision on the subsidiary protection application, the remaining grounds directed at the analysis and conclusions and at the use made in them of country of origin information, as the case was argued in the course of the leave hearing, maintain in substance that the decision-makers in the case have fallen into this error of relying upon the mechanical provision of material relevant to the various sub-headings of Regulation 5, without actually addressing and providing responses to the precise basis upon which the applicant claimed that he would be exposed to a real risk of serious harm in the DRC.

18. It is necessary, therefore, to consider the particular terms upon which the application for subsidiary protection was made in the light of the analysis and assessment given in the determination dated the 1st April, 2011. The application was made on the form provided for in Schedule 1 to the 2006 Regulations, which sets out eleven headings of details or information to be supplied which were numbered in the form actually used as ss. 1.1 to 1.11. The material particulars for present purposes are those set out in headings ss. 1.7 to 1.11.

19. In section 1.7 all three types of "serious harm" as defined in the Regulations were invoked: death penalty or execution; torture or inhuman or degrading treatment or punishment; and serious and individual threat to a civilian's life or person by reasons of indiscriminate violence in situations of international or internal armed conflict.

20. In section 1.8 the applicant provided "All of the grounds relating to your circumstances upon which you are relying in support of your application for subsidiary protection" extending over eleven pages and comprising extensive quotations from various sources of country of origin information. Under the heading "Torture, inhuman or degrading treatment, or punishment" the applicant first reiterated the essentials of the personal history he had relied upon in claiming asylum and directed the Minister to "the evidence previously given in respect of the applicant's case and in particular to his notice of appeal and submissions in support of same". It was then asserted that the fear of risk of serious harm requiring international protection "pertains to his fear of the death penalty by the government of the DRC". This is said to be based upon his fear that if repatriated he would be again exposed to the risk of serious harm because of his involvement in the demonstrations in March 2007: "The applicant has stated his grave concerns regarding further periods of detention and incarceration in prison in the DRC should he be returned".

21. There then followed a series of quotations from reports describing the dire conditions prevailing in prisons in DRC, including the frequency with which women are raped in prisons, the numerous deaths of inmates that occur and the prevailing conditions of neglect and under-funding. These quotations, however, do not appear to contain any material which would substantiate the particular risk to the plaintiff in respect of which they are invoked namely, that he would be at risk of being

incarcerated under such conditions because of his previous activities in March 2007. The material quoted does not identify particular categories of inmate likely to be found in those conditions, except to the extent that it is argued that the quotations demonstrate that there is a weak or non-existent State control and that abuses are committed by the security forces in all parts of the country, including arbitrary arrests and detention.

22. Next, material is cited to substantiate the proposition that the return of the applicant would expose him to serious and individual threat to his life or person by reason of indiscriminate violence in a situation of internal armed conflict. It is submitted that internal relocation would not be an option for the applicant because there is no part of DRC where he would not be at risk of suffering serious harm since the government authorities control all areas and could easily find him. It is also claimed that he would not have access to any protection afforded by the State because it is agents of the State that are responsible for the abuse and mistreatment.

23. In the final part of s. 1.8, a distinct basis for claiming exposure to a risk of serious harm was made which has been the subject of particular emphasis in argument by counsel and which does not appear to have been raised during the course of the asylum process. Over two pages of the application, information is put forward to substantiate the claim that there are no guarantees of safety for returned asylum seekers and that there is evidence to suggest the existence of a substantial risk that they will be ill treated on return. This is supported by a quotation from the Observer newspaper of September 2007 and an article from the Guardian newspaper in 2009, entitled "Britain Sending Refused Congo Asylum Seekers Back to Threat of Torture". The latter describes the case of two named failed asylum seekers who had been deported to DRC both of whom are reported to have been arrested and detained upon

return and beaten or tortured in "the notorious secret police headquarters in Kin Mazière".

24. The Determination of the application, as indicated, then follows the same layout and considers each of the headings in the various sub-paragraphs of Regulation 5, commencing with a summary of the "Serious Harm Claimed". The latter corresponds closely to the equivalent passage in the application and then identifies the key issue as "whether substantial ground has been shown for believing that (the applicant's) account of arbitrary State sanction is true; and further that if returned to DRC, he would face a risk of death penalty, torture, inhuman or degrading treatment or punishment, or serious and individual threat to his life or person, by reason of indiscriminate violence in the face of extant international or internal conflict; and critically, whether adequate protection is available to and accessible by the applicant".

25. Notwithstanding the criticisms directed at this identification of the key issue by counsel for the applicant, the Court is satisfied that this a fair and accurate summary of the essential elements of the claim made in the application.

26. Then, under the heading "Assessment of Facts and Circumstances" the decision maker first addresses the matters to be taken into account under para. (a) of Regulation 5(1) namely, "relevant facts related to the country of origin, including laws and regulations and the manner in which they are applied . . . including the availability of protection against serious harm". Under that heading the decision maker first addresses the question of prison conditions in DRC in the light of the claim that the applicant had suffered serious ill treatment in a State prison where he had been held for a period of in excess of two and a half years. The decision maker refers to the US Department of State Report of the 25th February, 2009, which had been extensively quoted in the application and says "In the light of the foregoing, it is

considered necessary to evaluate the consistency of the applicant's overall testimony against the most recent country of origin information available".

27. The decision maker points out that during the asylum process the applicant's claim to have been involved in the particular political activities had been discounted as lacking credibility. Nevertheless, if "it was to be accepted that the applicant had past links with the MLC, country of origin information relating to an emerging democracy in DRC, indicates that DRC has now made considerable progress in its transition to democracy". It then refers to the outcome of elections in July 2006, in which MLC candidates gained 64 seats and draws the conclusion: "The participation and political inclusion of the MLC and various other disperate political groups in the democratic process in the DR Congo, would seem to indicate that the applicant can no longer reasonably assert a well founded fear of State sanction on foot of his political opinion. Accordingly, it is considered that the applicant will not be subjected to State censure for engaging in lawful political activity with the MLC should he return (or be returned) to DR Congo: country of origin information indicates that if such a scenario were to arise, the applicant has access to extant constitutional protection, legal redress and police protection; and, if necessary, avail of the protection of the international agency, MONUC".

28. This section of the determination then concludes: "Overall, and having regard to all of the facts on file, and in particular the serious credibility about the veracity of applicant testimony, I am not satisfied that the applicant has demonstrated that he is without protection in DRC, and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm . . .".

29. Having regard to the care taken and the detail with with which this aspect of the application is examined and answered it cannot, in the judgment of the Court, be

said that any substantial ground has been raised in relation to the manner in which the Determination addresses this principal basis of the claim to a risk of serious harm namely, the reality of the applicant being detained and incarcerated in the conditions described as a result of his previous political activities. The not unreasonable answer based upon relevant information given by the decision maker is that, quite apart from the doubts as to the veracity of the applicant's story, political conditions have changed since 2006, and while prison conditions may be as appalling as described, it is judged that there is no basis for fearing that the applicant will in fact be targeted for incarceration on the basis he has claimed.

30. In a further section of the Determination the decision maker addresses the question as to whether "the applicant has already been subjected to serious harm" as required by Regulation 5(2). Here, the decision maker first refers to the applicant's claim that he was arrested and detained without trial in Tshatshi State prison camp for over two years, during which he was interrogated and subjected to torture and inhuman and degrading treatment by prison guards. The answer that is given to that claim under this heading is as follows:-

> "In accordance with Regulation 2(1), non-state actors can only be considered to be actors of serious harm if it can be demonstrated that the state, or parties or organisations controlling a state or a substantial part of the territory of that state, are unable or unwilling to provide protection against serious harm. It has not been demonstrated that the DRC state is unable or unwilling to provide protection against the treatment allegedly suffered by the applicant and therefore, the alleged inflictors of this treatment cannot be considered to be 'actors of serious harm' within the meaning of Regulation 2(1). As serious harm can only be carried out by 'actors of serious harm' within the meaning of

Regulation 2(1), I do not find any evidence that (the applicant) has suffered treatment in DR Congo that would come within the definition of 'serious harm' as defined in Regulation 2(1)."

31. In the judgment of the Court, an arguable ground arises here as to the coherence and adequacy of this assessment and conclusion for the purposes of Regulation 5(2). The logical connection between the first and second parts of the section of the Determination is by no means clear. The first part acknowledges that the claim is based upon the proposition that the applicant "was arrested by the DRC State authority and detained without trial" in a particular prison camp. That is a claim that serious harm has been previously suffered at the hands of DRC State agents or authorities and therefore as "State actors" for the purposes of the definition in Regulation 2(1). It was not any part of the application for subsidiary protection that previous serious harm had been at the hand of "non-State actors". What was claimed was that if now repatriated, the applicant would be at risk of the same form of serious harm by the same State actors and that protection by national authorities was unavailable because control over security forces was non-existent in all parts of the country. What is surprising about the response given to the question raised under Regulation 5 (2) is that in the earlier parts of the Determination the decision-maker appears to rely upon the findings of lack of credibility as to whether the imprisonment, torture etc ever took place but instead of giving a simple negative answer to the question on that basis, the decision-maker appears to dispose of the issue in the belief that the claimed previous serious harm was perpetrated by non-state actors. It may well transpire at a substantive hearing of this application that this is not a sufficiently material ground to vitiate the legality of the decision when read as a whole but as the threshold for leave is that of an arguable case, the Court considers

that there is a sufficient question mark as to whether the issue of previous serious harm having been suffered has been coherently considered for the purpose of the 2006 Regulations. As noted in paragraph 27 above, the decision-maker did not rely solely on the applicant's lack of credibility but considered also the information as to the changes in political and security conditions in the DRC. Accordingly there is an uncertainty as to what the author had in mind when concluding: "I do not find any evidence that [the applicant] has suffered any treatment in DR Congo that would come within the definition of "serious harm…". Is this because it is not believed the incarceration, torture etc ever took place as claimed or, because it might have done but was harm inflicted by persons who were not "actors of serious harm"?

"ACTORS OF SERIOUS HARM"

32. Independently of that view of this particular part of the Determination, it may be useful to comment in passing upon a point which was alluded to but not pressed in relation to the statement in the second paragraph to the effect that serious harm can only be carried out by "actors of serious harm". Counsel for the applicant pointed out that queries had been raised in previous cases before the High Court as to the correctness of the proposition advanced in the Determination in this regard. The legal ambiguity is said to arise out of the fact that while Regulation 2(1) contains a definition of "actors of persecution or serious harm" which reflects and transposes the precise wording of Article 6 of the Qualifications Directive, the term "actors of serious harm" is not actually used or applied in any other provision of the Regulations. The same can be said to be true in the Directive as regards the contents of Article 6. This query as to the significance and purpose of this definition in the Regulations and Directive has been adverted to in, for example, the judgment of Cross J. of the 1st March, 2012, in *J.T.M. v. Minister for Justice and Equality.* The argument

is made that the statement in the Determination is incorrect in construing the Directive and the Regulations in a manner confining eligibility for subsidiary protection to cases where the threat of serious harm emanates from an "actor of serious harm". It is pointed out that in a literal interpretation of the 2006 Regulations, the definition of "serious harm" as such is not so limited.

33. In the judgment of the Court, it is important when applying principles of interpretation to domestic regulations which transpose and implement the provisions of a European Union directive not to place undue reliance upon literal construction and upon the common law approach to statutory interpretation. In the judgment of the Court, it is unwise to attribute undue significance to the fact that the contents of Article 6 of the Directive are in this instance to be found transposed in the definition section of the Regulations, thus giving rise to the implication that the definition is superfluous because no reliance appears to be placed upon it elsewhere in the Regulations. Insofar as that could be said to give rise to an ambiguity in the construction of the Regulations, it is, in the view of the Court, an ambiguity which falls to be resolved by recourse to a purposive construction of the Regulations in the light of the objectives of the Directive.

34. The commitment of the Contracting States to the Refugee Convention of 1951 and of the Member States of the European Union as addressees of the Qualifications Directive, to provide international protection to refugees and to individuals who qualify for its complementary form of subsidiary protection within the European Union, is predicated upon the premise that in international law it is a primary duty of every sovereign state by its institutions and through its security forces and agencies to protect its own nationals both from external attack and from internal violence and harm. The international community refrains from intervening in the internal

relationships between a State and its own nationals and will do so only where an individual claimant is outside the country of nationality by reason of the threat to him or her there of persecution or serious harm and because the government and agencies of the country in question are unwilling or unable to afford protection domestically to their own nationals in those conditions. International protection is accorded only where national protection in the country of origin is not. The point is expressed in the following way by McAdam in "*Complementary Protection in International Refugee Law*" (Oxford University Press 2007 p. 20): "The need for international protection is predicated on the breakdown of national protection – a lack of basic guarantees which states normally extend to their citizens". The same point is made by Hathaway: "Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be to one's own state." (The Law of Refugee Status: Butterworths 1991 p.133.)

35. It is also important to bear in mind that international protection comprises two elements namely, the threshold or conditions of qualification for protection and the rights that then attach and confer a status in international law upon the individual who is found to so qualify. Separately from refugee status as such, Article 33 of the Refugee Convention (implemented in s.5 of the Refugee Act 1996), prohibits the Contracting States returning any person to a territory where the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. Thus, an individual who is not a refugee may nevertheless benefit from the protection afforded by this prohibition but, while the prohibition prevents the removal of such an individual, it does not operate to confer any particular status in international law upon the person concerned. In effect, the Qualifications Directive is a first attempt by a group of

sovereign states to extend international protection in a form complementary to refugee status by conferring a legal status upon persons who are beneficiaries of the non *refoulement* obligation. (See chapters VI and VII of the Qualifications Directive).

36. In the view of the Court, it is in the light of that background and objective that it is necessary to consider the purpose and effect of the definition of "actors of persecution or serious harm" as it appears in s.2 (1) of the 2006 Regulations giving effect to Article 6 of the Directive. It is a mistake, in the view of the Court, to focus upon that definition in isolation because it falls to be read and applied in conjunction with the definition of "serious harm" itself and the definitions of "person eligible for subsidiary protection" and "protection against persecution or serious harm" in Regulation 2(1) based upon Article 7 - "actors of protection" - in the Directive.

37. Article 6 defines "actors of persecution or serious harm" to include:-

(a) The State;

(b) Parties or organisations controlling the State or a substantial part of the territory of the State;

(c) Non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b) including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

38. Article 7 provides:-

(1) Protection can be provided by:-

(a) The State; or

(b) Parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

(2) Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

39. Article 7.2 and Article 6(c) must be taken together. International protection is only afforded when national protection is unavailable. National protection is to be treated as not available when the source or cause of serious harm is the State itself or its institutions, authorities, forces or agencies; or parties or organisations controlling the state or a substantial part of its territory. Where the cause or source of the feared serious harm is one not attributable to or controlled by the State or its agencies, it lies first with the State through its own forces or agencies to protect its nationals domestically against that source of harm. Thus, Article 7.2 makes it clear that national protection in the State of nationality will be taken to be available when the "State actors" defined in paras. (a) and (b) are shown to take reasonable steps to prevent the serious harm. It is only where those "State actors" are shown to be unwilling or unable to protect an individual against serious harm by "non-State actors" that the individual has a call upon the international community's promise of international protection.

40. The statement in the Determination that "serious harm" can only be carried out by "actors of serious harm" within the meaning of Regulation 2(1) is correct because, in practical terms, if the claim to a risk of serious harm is based upon a cause or source other than the State of nationality itself and its forces and agencies or parties or organisations controlling that State or a substantial part of its territory, national

protection is taken to be available and international protection is therefore unnecessary provided it is shown that the "State actors" take reasonable steps to prevent the serious harm in question when perpetrated by "non-State actors". Thus "non-State actors" can become "actors of serious harm " only where it is not shown that the State of nationality is unable or unwilling to prevent the harm perpetrated by the non-State actors.

41. It follows in the view of the Court that an arguable case has been made out for the grant of leave to challenge the consideration given in the Determination to the matters required to be considered under Regulation 5(2) namely, whether the applicant had been subject to previous serious harm. The Court will therefore grant leave to apply for judicial review of the determination of the application for subsidiary protection upon a ground formulated in the following terms:-

> "The respondent erred in fact and in law in the assessment made and the reason given for concluding that the applicant has not been subjected to previous 'serious harm' in DRC as required by Regulation 5(2) of the European Communities (Eligibility) for Protection Regulations 2006."

42. The Court also considers that the applicant is entitled to be granted leave in respect of a further ground in that the Determination can be arguably said to have ignored and not to have answered the specific claim made in the application that, based on country of origin information as cited, returned asylum seekers face a risk of detention, interrogation and torture such as would amount to "serious harm" within the definition. As indicated above, this is a claim which appears to have been introduced for the first time in the subsidiary protection application and it is not directly adverted to or answered in the Determination. It may well be that an answer to it can be forthcoming in the light of the Determination when construed as a whole,

but if the issue was to be addressed in the Determination, one would have expected the decision maker to have referred to the possible fact that other individuals had been deported from Ireland to the DRC without difficulty or that country of origin information would have been cited to demonstrate that the claim was unfounded or that the occurrence of any previous such incidents had ended. Again, given that the threshold for leave is that of an arguable case, the Court is satisfied that the applicant is entitled to leave upon the basis of a ground to be formulated as follows:-

> "The determination of the application for subsidiary protection is defective in law in that it fails to address and decide the claim to risk of serious harm made in the application that the applicant would be at risk of serious harm on repatriation to the DRC as a returning failed asylum seeker."

THE DEPORTATION ORDER

43. There remains, accordingly, the application for leave made in respect of the deportation order. The practical reality of this application is that its outcome is dependent upon the success or otherwise of the challenge to the determination of the subsidiary protection application. In the judgment of the Court, insofar as any particular grounds have been put forward against the deportation order as such, none has been made out to the extent that would constitute a substantial ground for the grant of leave to challenge that decision independently of the challenge to the subsidiary protection refusal. The representations which are alleged not to have been considered were somewhat brief and perfunctory and nothing was said in relation to the prohibition of refoulement under s. 5 of the Act of 1996 which was not already covered by the subsidiary protection application. So far as concerns the entitlement to protection by reference to s. 5 of the Refugee Act 1996, is concerned, his claim has been rejected primarily by reason of the lack of credibility in his original claim to

have suffered persecution by reason of his involvement with the MLC and his participation in the demonstrations of March 2007. As such, his claim based on s. 5 has in fact been considered and rejected. Further, the applicant is not in a position to put forward any substantial ground by reference to a claim to unlawful interference with his entitlement to protection of his family life or private life under Article 8 of the European Convention on Human Rights.

44. Because the validity of the deportation order is dependent upon the prior definitive rejection of an application for subsidiary protection, the Court proposes to deal with the application to challenge the deportation order in the light of the leave granted to challenge the refusal of subsidiary protection by granting leave in this respect upon a single ground as follows:-

> "The making of the deportation order in respect of the applicant was unlawful because of the absence of any valid prior decision on the applicant's application for subsidiary protection."

45. Leave will, accordingly, be granted to apply for orders of *certiorari* in respect of the refusal of the application for subsidiary protection of the 1st April, 2011, and the deportation order dated the 15th July, 2011. The further declaratory reliefs sought in the statement of grounds dated the 11th August, 2011, are not necessary. The order will, however, include reliefs in the terms of paras. 11, 12 and 13 of the statement of grounds. In lieu of the thirteen grounds set out in the statement of grounds, leave will be granted by reference to the three grounds outlined above.

John D Cooke

MR JUSTICE COOKE

APPROVED TEXT