



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 184

Appeal Number: 2018/186

**Faherty J.
Haughton J.
Power J.**

BETWEEN/

F.M.

**APPLICANT/
APPELLANT**

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

- AND -

Appeal Number: 2018/189

BETWEEN/

I.M.

**APPLICANT/
APPELLANT**

- AND -

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS**

- AND -

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

- AND -

Appeal Number: 2018/190

BETWEEN/

P.C.N. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND J.N.)

**APPLICANT/
APPELLANT**

- AND -

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS**

- AND -

Appeal Number: 2018/191

BETWEEN/

J.N.

**APPLICANT/
APPELLANT**

- AND -

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS**

- AND -

Appeal Number: 2018/192

BETWEEN/

S.W. I. M. S. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A.B.F.)

**APPLICANT/
APPELLANT**

- AND -

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS**

- AND -

Appeal Number: 2018/193

BETWEEN/

J.U.

**APPLICANT/
APPELLANT**

- AND -

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS**

- AND -

Appeal Number: 2018/194

BETWEEN/

T.O.

**APPLICANT/
APPELLANT**

- AND -

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS**

- AND -

Appeal Number: 2018/195

BETWEEN/

R.B.

**APPLICANT/
APPELLANT/**

- AND -

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS**

- AND -

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

- AND -

Appeal Number: 2018/200

BETWEEN/

H.Y.O. AND D.F.O.I. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND H.Y.O.)

**APPLICANTS/
APPELLANTS**

- AND -

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS**

- AND -

Appeal Number: 2018/359

BETWEEN/

D.D.

**APPLICANT/
APPELLANT**

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

JUDGMENT of Ms Justice Faherty dated the 27th day of February 2020

1. Ten appeals come before this Court for consideration, arising from the High Court's (Humphreys J's) dismissal, in a series of judgments, of challenges brought by the appellants to the first respondent's (hereinafter "the Minister") refusal to grant them subsidiary protection.
 2. The relevant law at issue is that contained in Directive 2004/83/EC of 29 April 2004, O.J. L304/12, 30.9.2004 ("the Qualifications Directive"), which provides for the establishment of minimum standards for qualification for refugee status or subsidiary protection. The Qualifications Directive was transposed into Irish law by the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518/2006) ("the 2006 Regulations"). The 2006 Regulations were in force until 2013 and operated in the context of a system whereby applicants seeking refugee status were dealt with firstly under the statutory scheme (the Refugee Act 1996, as amended) which established the Office of the Refugee Applications Commissioner ("ORAC") with a right of appeal to the Refugee Appeals Tribunal ("RAT") and, thereafter, a decision of the Minister to grant or refuse a declaration of refugee status.
 3. Under the 2006 Regulations, the ability to apply for subsidiary protection was confined to those persons whose applications for asylum had been refused, and accordingly it was only at the point of such refusal that an application for subsidiary protection could be made. The system in place was commonly referred to as the "bifurcated" system. The 2006 Regulations were replaced by the European Union (Subsidiary Protection) Regulations 2013 (S.I. No.426/2013) ("the 2013 Regulations"), which introduced new procedures. The 2013 Regulations, in turn, have been replaced by the International Protection Act 2015 which established a common procedure for the examination of asylum and subsidiary protection applications. It is, however, to the bifurcated system as described above that these appeals relate.
 4. Each of the appellants in the within appeals was the recipient of a negative decision of the Minister in respect of refugee status following adverse appeal decisions from the RAT. In each case, the Minister's letter refusing refugee status offered the applicant the opportunity to leave the State voluntarily or to consent to a deportation order. The letter informed the applicant of his or her right to apply for subsidiary protection and/or make representations to the Minister seeking permission to remain temporarily in the State in accordance with s.3(3)(b) of the Immigration Act 1999, as amended.
 5. The following is a brief outline of the appellants' respective factual backgrounds and the timelines involved in their requests for international protection:
- F.M.**
6. F.M. is a national of DR Congo. He applied for asylum on 23 September 2008. By decision dated 26 April 2010, the RAT upheld ORAC's recommendation that asylum be refused. On

25 June 2010, the Minister refused him refugee status. His subsidiary protection application was made on 14 July 2010 and primarily related to a risk, if he was returned to DR Congo, of torture or inhuman and degrading treatment or punishment because of his ethnicity and political opinion (essentially the same claim as made in his asylum application) and also because of his being a failed asylum seeker. Subsidiary protection was refused by decision dated 29 April 2011. The deportation order which duly issued against F.M. has however been revoked and he has been granted a temporary permission to reside in the State.

I.M.

7. I.M. is a national of Ghana. He sought asylum in 2008. ORAC recommended refusal and this was affirmed by the RAT on 10 February 2009. The Minister's decision refusing him refugee status issued on 25 March 2009. He applied for subsidiary protection on 17 April 2009. His claim was based on a risk, if he was to be returned to Ghana, of torture or inhuman and degrading treatment or punishment and on serious and individual threat to a civilian's life or person by reason of international or internal armed conflict. He was refused subsidiary protection on 8 November 2012. I.M.'s deportation order has since been revoked and he currently has permission to remain in the State until June 2022.

P.C.N.

8. P.C.N. was born in the State on 26 August 2006, of Zimbabwean and DR Congolese parentage. An application for asylum was made on his behalf by his parents on 14 January 2008. On 6 November 2008, the RAT affirmed ORAC's recommendation that asylum be refused. The Minister's decision refusing him refugee status issued on 13 January 2009. His claim for subsidiary protection, initiated on 11 February 2009, was based on a risk, if he was to be returned to DR Congo, of torture of torture or inhuman and degrading treatment or punishment on the basis of his membership of a particular social group/implied political opinion and serious and individual threat to a civilian's life or person by reason of international or internal armed conflict. The application also relied on the treatment of failed asylum seekers upon return to DR Congo and information regarding various shortcomings in that State. Subsidiary protection was refused by decision dated 26 July 2011. A deportation order which duly issued in respect of P.C.N. on 5 August 2011 has since been revoked and he has been granted permission to reside in the State.

J.N.

9. J.N. (the mother of P.C.N.) is a national of Zimbabwe. She sought asylum on 7 July 2006. On 3 October 2008 the RAT affirmed ORAC's refusal of asylum. The decision of the Minister refusing her refugee status issued on 9 January 2009. She applied for subsidiary protection on 28 January 2009 based on a risk, if she was returned to Zimbabwe, of torture or inhuman and degrading treatment or punishment on the basis of her membership of a particular social group/implied political opinion and serious and individual threat to a civilian's life or person by reason of international or internal armed conflict. Subsidiary protection was refused on 26 July 2011. The deportation order which issued against J.N. was revoked following a grant of permission on 8 October 2013 which remains in place.

S. S.

10. S.S., a Nigerian national, was born in Ireland in 2010. His mother claimed asylum on his behalf on 19 October 2010. ORAC's recommendation not to grant him asylum was affirmed by the RAT on 3 February 2011 following which the Minister refused him refugee status on 28 February 2011. On 16 March 2011, he sought subsidiary protection based on a risk, if he was to be returned to Nigeria, of torture or inhuman and degrading treatment or punishment based on his membership of a particular social group/implied political opinion and serious and individual threat to a civilian's life or person by reason of international or internal armed conflict. His fears were similar to those raised in his asylum application. The decision refusing him subsidiary protection issued on 7 July 2011. A deportation order has since been executed in respect of S.S. and he has been deported to Nigeria.

J.U.

11. J.U., a national of Bangladesh, applied for asylum in the State on 3 March 2008. He claimed to have been an NGO worker who was attacked in Bangladesh because of his attempts to mediate a resolution between a rape victim, a perpetrator and other persons. His asylum claim did not specifically claim persecution on grounds of political opinion but rather on grounds of membership of a human rights body. In a decision dated 21 July 2009 the RAT affirmed ORAC's recommendation to refuse asylum and the Minister's refusal issued on 7 October 2009. In October 2009, he applied for subsidiary protection based on political opinion. The political opinion was unspecified. The refusal of subsidiary protection issued on 4 August 2011.

T.O.

12. T.O., a national of Nigeria, arrived in the State in or about December 2008 and applied for asylum on 30 December 2008. On 29 September 2009 the RAT affirmed ORAC's recommendation to refuse asylum and on 15 October 2009, the Minister refused her refugee status. She applied for subsidiary protection on 26 August 2010. Her claim for protection primarily related to a risk, if she returned to Nigeria, of torture or inhuman and degrading treatment or punishment. Her subsidiary protection application was refused under cover of letter dated 18 May 2011. A deportation order issued on 15 July 2011, to which she remains subject.

R.B.

13. R.B. is a national of Bangladesh and is a practising Buddhist. He claimed asylum in November 2010 based on his having to flee Bangladesh in the face of resistance from Islamic extremists who objected to his father's plans to construct a Buddhist school. ORAC's refusal of asylum was affirmed by the RAT on 26 April 2011 following which he was refused refugee status by decision of the Minister dated 31 May 2011. R.B. had earlier applied for subsidiary protection on 18 May 2011. His application was refused by decision dated 11 May 2012.

H.Y.O. and D.F.O.I.

14. H.Y.O. and D.F.O.I. (born 22 October 2009) made claims for asylum on 21 August 2009 and 25 November 2009, respectively. Their claims were largely based on fear of persecution in Nigeria by a group known as Boko Haram. In May 2010, the asylum claims

were refused on credibility/internal relocation grounds. The Minister refused them refugee status on 6 July 2010. They then made an application for subsidiary protection on 26 July 2010 which was refused by decision dated 26 July 2012. Deportation orders made on 30 August 2012 were duly acted upon by GNIB.

D.D.

15. D.D.'s case was that he was born in Liberia but was taken to Nigeria at the age of 5. He claimed to have been the victim of sexual abuse at the hands of a religious man with whom he had been taken to live. He claims that on the death of this religious man he was informed that he would have to replace him as a chief, which would involve certain rituals in which he did not want to participate. He wished to return to his original Christian beliefs. This caused difficulties which forced him to flee Nigeria. He applied for asylum on 6 October 2008. His claim was rejected by the RAT on appeal on 12 February 2009. The Minister's decision to refuse refugee status issued on 18 March 2009. On 4 April 2009, he applied for subsidiary protection which was refused on 6 December 2012. D.D. has since been granted temporary permission to reside in the State.
16. In each of these cases, all the grounds upon which the subsidiary protection decisions were challenged were rejected by the trial judge.
17. By and large, the legal issues which arise for determination in respect of all ten appeals are identical. The grounds of appeal in all cases are essentially generic grounds relating to the system in place for the determination of subsidiary protection applications at the time the appellants' applications were made. None of the appellants has appealed from the dismissal by the trial judge of the case specific grounds of judicial review in the individual cases.
18. It is agreed that the followings issues fall to be decided: -
 - (i) whether the impugned subsidiary protection decisions should be quashed for breach of the *audi alteram partem* rule;
 - (ii) whether judicial review vindicated the appellants' right to an effective remedy in regard to the refusals of subsidiary protection; and
 - (iii) whether the regime in place under which the appellants applied for subsidiary protection was compatible with EU law.
19. In the course of his oral submissions, counsel for the appellants largely confined his arguments to the third issue. By the same token, however, counsel did not resile from issues (i) and (ii) albeit that he accepted that these issues have been addressed in judgments of the Court of Appeal and the Supreme Court, adverse to the arguments canvassed in the appellants' written submissions in the within appeals.
20. For the purposes of clarity and completeness, all three issues as identified above will be addressed.

(i) Alleged breach by the Minister of the *audi alteram partem* rule

21. It is contended on behalf of the appellants that the subsidiary protection decisions should be quashed for breach of the *audi alteram partem* rule. It is submitted that the appellants' right to be heard was breached by the failure to have any appeal process in place in respect of their subsidiary protection applications. It is also alleged that the various country of origin information reports which the Minister consulted and relied upon to refuse subsidiary protection were not put to the appellants at any stage, thereby breaching their right to be heard. Although accepting that, generally, there may be no need to put or show "mainstream" country of origin information to a subsidiary protection applicant, counsel argues that in circumstances where there was no appeal process, or process akin to the revocation of a subsidiary protection decision, the appellants' right to be heard required that they be informed, in advance of any decision on their subsidiary protection applications, of the Minister's intended reliance on such information. It is argued that this was particularly so where a subsidiary protection applicant was never aware when the decision on his or her subsidiary protection application would be taken.
22. The right of a person seeking international protection to be heard has been the subject of judicial discourse both at EU and national level. In *M.M. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 547, the following question was referred to the CJEU by Hogan J.:

"In a case where an applicant seeks subsidiary protection status following a refusal to grant refugee status and it is proposed that such an application should be refused, does the requirement to cooperate with an applicant imposed on a Member State in Article 4(1) of Council Directive 2004/83/EC require the administrative authorities of the Member State in question to supply such applicant with the results of such an assessment before a decision is finally made so as to enable him or her to address those aspects of the proposed decision which suggest a negative result?"

23. The CJEU addressed the question posed by Hogan J. in a judgment delivered on 22 November 2012 in *M.M. v. Minister for Justice, Equality and Law Reform* (Case C-277/11) EU: C: 2012:744, [2013] 1 W.L.R. 1259. It stated as follows:

"60 ... with regard to the scope that should be accorded to the requirement to cooperate with an applicant which Article 4(1), second sentence, of Directive 2004/83 imposes on the Member State concerned, the Court cannot accept the proposition, put forward by Mr M., that that rule requires the national authority responsible for examining an application for subsidiary protection to supply the applicant, before adoption of a negative decision on that application and where an application for asylum made by the same person has previously been refused, with the elements on which it intends to base its decision and to seek the applicant's observations in that regard.

61 A requirement of that kind in no way results from the wording of the provision in question. If the EU legislature had intended to impose on Member States

obligations such as those advocated by Mr M., it would certainly have done so expressly."

That being said, the CJEU went on to opine:

"83 Article 41(2) of the Charter provides that the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, and the obligation of the administration to give reasons for its decisions.

84 It must be stated that, as follows from its very wording, that provision is of general application.

85 Thus the Court has always affirmed the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person (see, inter alia, Case 17/74 Transocean Marine Paint Association v Commission [1974] E.C.R. 1063, paragraph 15; Krombach, paragraph 42; and Sopropé, paragraph 36)."

24. The answer given by the CJEU was as follows:

"The requirement that the Member State concerned cooperate with an applicant for asylum, as stated in the second sentence of Article 4(1) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 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.

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."

25. When the matter came back before Hogan J., although satisfied that the applicant could not succeed on the specific ground upon which the reference to the CJEU had been made, he concluded that in light of the CJEU's answer it was necessary to quash the decision of the Minister since he found it implicit in the CJEU's judgment that the Minister had to make a separate and independent adjudication of M.M.'s claims (which had not been done), with the possibility of an oral hearing, if necessary. (See *M.M. v. Minister for Justice* [2013] IEHC 9, [2013] 1 I.R. 370).

26. The decision of Hogan J. was appealed to the Supreme Court. The Supreme Court referred the following question to the CJEU:

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

27. In its judgment dated 9 February 2017, *M. v. Minister for Justice and Equality & Ors* (Case-C560/14) EU: C: 2017: 101, [2017] 3 C.M.L.R. 2, pp.58-61, the CJEU held:

"38. ...the fact that an applicant for subsidiary protection has been able to set out his views only in written form cannot, generally, be regarded as not allowing effective observance of his right to be heard before a decision on his application is adopted.

39. Indeed, having regard to the nature of the elements referred at [36] of the present judgment, it cannot, in principle, be ruled out that they may be effectively brought to the attention of the competent authority by means of written statements by the applicant for subsidiary protection or of an appropriate form prescribed for that purpose, accompanied, where appropriate, by the documentary evidence which he wishes to annex to his application.

...

56. In the light of all the foregoing considerations, the answer to the question referred is that the right to be heard, as applicable in the context of Directive 2004/83 does not require, as a rule, that, where national legislation, such as that at issue in the main proceedings, provides for two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, the applicant for subsidiary protection is to have the right

to an interview relating to his application and the right to call or cross-examine witnesses when that interview takes place.

57. An interview must nonetheless be arranged where specific circumstances, relating to the elements available to the competent authority or to the personal or general circumstances in which the application for subsidiary protection has been made, render it necessary in order to examine that application with full knowledge of the facts, a matter which is for the referring court to establish.”

28. Following the CJEU’s ruling, the Supreme Court handed down its judgment in the matter on 14 February 2018 (see *M.M. v. Minister for Justice and Equality & Ors* [2018] IESC 10, [2018] 1 I.L.R.M. 361) allowing the Minister’s appeal of Hogan J.’s order. At para. 25, O’Donnell J. stated:

“It remains only to apply that ruling to determine this appeal. The court has received extensive argument, and a proliferation of materials. However, in my view the outcome of the case is clear and straightforward. The decision of the European Court of Justice makes it clear that it in the Irish context which existed at the time of the decision here, and where the decision on subsidiary protection was a separate decision taken after the determination of the asylum process, it was permissible to make that decision on the basis of a written procedure, so long as the procedures adopted were sufficiently flexible to allow the applicant to make his case. That was plainly the case here. Exceptionally, it may be necessary to permit an oral interview. It cannot be contended here however that such an exceptional situation arose: the submission seeking subsidiary protection identified only those matters which had already been relied on in the claim for asylum. The decision of the ECJ also makes it clear that it is permissible to have regard to the information obtained in the asylum process, and the assessment of the decision-maker. There is in this case no basis for contending for an oral hearing, still less for an adversarial hearing. It was argued, faintly, that Irish law might require more in that procedure, but at this stage of the proceedings that argument is in my view as forlorn as a matter of procedure, as it is of substance. The appeal must be allowed and the order of certiorari made by the High Court must be set aside, and the application for judicial review dismissed.”

29. The question of whether it was necessary to notify subsidiary protection applicants of country of origin information proposed to be relied on by the Minister was also considered in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61, [2018] 1 I.L.R.M. 109 where, at para. 60, O’Donnell J. had this to say:

“On the first issue certified, the notification of country of origin information, the applicant did not make extensive submissions. Having considered the affidavit evidence and the case law, I am persuaded that the High Court was correct to consider that unless the country of origin material considered was in some respect unusual, there was no obligation on the Minister to confine himself or herself to the country of origin information submitted by the applicant, or to notify the applicant

of any additional country of origin information of the same general nature considered by the Minister. This was not a case of submission to an independent decision maker expected to bring to the issue nothing more than an open mind. The Minister is an office holder obliged by law (as set out in case such as JK v. Sweden referred to at para. 41 above) to be aware of up-to-date information in respect of a country, and to act on it, even if it had not been adverted to by or on behalf of the applicant. It is also clear from the correspondence submitted by the applicant, from the very outset, that country of origin information from standard publicly available sources, is the lingua franca of any deportation decision making process. Again, it is clear from the evidence that the applicant made copious and repeated use of such information which was presented in a fashion that clearly assumed the Minister was familiar with the same information and sources. Tellingly, when the applicant made detailed representations under the s.3(11) procedure for revocation of a deportation order, he did not complain of the fact that the Minister had considered materials such as the 2015 US State Department Report, which had not been submitted by the applicant, or notified to him or his representatives by the Minister. Indeed, the applicant made his own submissions on that material and furnished a full copy. In the circumstances of this application, I agree with the High Court that there was no obligation to notify the applicant that the Minister was going to have regard to contrary information of the same nature as that submitted by the applicant.”

30. The appellants’ principal submission on the issue appears to be that the absence of an appeals process at the time their respective subsidiary protection decisions were made rendered it imperative that they be informed of the country of origin information being relied on and given an opportunity to comment on such information.
31. I am satisfied, however, that the argument advanced by the appellants in this regard must be rejected. The absence of an appeal process at the time the impugned decisions were taken cannot, of itself, constitute grounds upon which to vitiate the decisions on the basis of an asserted breach of the right to be heard. As is clear from what is set out below (in considering issue (ii)), judicial review is an effective remedy for the purposes of Article 47 of the Charter of Fundamental Rights of the European Union (“the EU Charter”), as found by the CJEU and the courts in this jurisdiction. It is thus a sufficiently flexible remedy whereby the Minister’s assessment of the subsidiary protection applications is amenable to scrutiny, where it is alleged that procedural or substantive deficiencies attach to the Minister’s decision.
32. Moreover, the appellants have failed to identify the type of exceptionality referred to by O’Donnell J. at para. 25 of his judgment in *M.M. v. Minister for Justice and Equality & Ors* such as might have rendered it imperative for the Minister to permit an oral interview, or otherwise invite comments from the appellants on the country of origin information then being considered by the Minister. As I have already observed, it has not been argued before this Court on behalf of any of the appellants that the Minister failed to consider cogent and reliable country of origin information relevant to their particular circumstances

or that there was any other *case specific* error or omission on the part of the Minister. More particularly, with regard to any one of these appeals, it has not been argued that the trial judge erred in finding that the Minister properly considered cogent and up to date country of origin information in determining the respective subsidiary protection applications. By way of example, in the case of F.M., I note, from a perusal of the subsidiary protection decision, that the country of origin information relied upon was cogent and up to date.

33. In all the circumstances of these cases, I perceive no basis upon which to hold that the trial judge erred in failing to quash the subsidiary protection decisions on the ground that the appellants' right to be heard was breached.

(ii) Whether judicial review vindicated the appellants' right to an effective remedy as regards the refusal of subsidiary protection

34. The case made by counsel for the appellants in written submissions is that adherence to the Qualifications Directive requires respect for the EU Charter (as reflected in Recital 10 of the Directive) and that Article 47 of the EU Charter mandates an effective remedy in respect of any refusal of subsidiary protection.
35. It is acknowledged that the only mechanism available to the appellants to challenge the subsidiary protection decisions in issue in the within appeals was by way of judicial review.
36. The question of whether judicial review is an effective remedy for the purposes of the EU Charter has been the subject of extensive litigation at national and EU level, a fact acknowledged by counsel for the appellants. Counsel also accepted that the argument that judicial review is not an effective remedy has been rejected by the Court of Appeal in *N.M. v. Minister for Justice* [2016] IECA 217, [2018] 2 I.R. 591 and by the Supreme Court in *A.A.A. v. Minister for Justice* [2017] IESC 80.
37. In both his written and oral submissions, counsel for the appellants asserted that he only proposed to formally open his arguments as to the effectiveness of judicial review as a remedy "so that they may be raised in another forum if necessary". As I have already observed, as the issue has been raised before this Court, it is necessary to deal with the arguments raised.
38. In summary, the appellants' argument can be distilled, as follows:
- where the only remedy available to the appellants for the purposes of challenging their subsidiary protection decisions was judicial review, that could not amount, on its own, to a remedy capable of satisfying the requirement of Article 47 of the EU Charter;
 - only an appeal mechanism (as is now available under the current regime which governs subsidiary protection) could satisfy the requirement of an effective remedy under EU law;

- judicial review could not be an appropriate remedy even in light of the principles enunciated in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701;
- where an applicant claims to have been deprived of a fundamental (EU law) right to subsidiary protection, the standard of review must be that of the “correctness” of the first decision: in the context of an application for subsidiary protection there is either a risk of serious harm or there is not;
- where a constitutional analysis is required to be carried out as to whether a right has been breached, it has either been breached or it has not. The “*administrative law standard of review is not applicable to the constitutional component of judicial review*”, citing *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256;
- it is not sufficient for the court to hold that the first decision was a reasonable assessment of materials if the court is precluded from forming its own conclusions on the assessment. The decision of the reviewing body must be correct and not a review of whether the earlier decision was reasonable; and
- an effective remedy must provide for a “full and ex nunc examination of both facts and points of law.”

39. In *Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration (Case C-69/10)* EU:C:2011:524, [2011] E.L.R. 1-7151, the CJEU considered that what was necessary for an effective remedy was that the reasons which lead the competent authority to reject the application as unfounded could be subject to “*a thorough review by the national court, within the framework of **an action against the decision rejecting the application.***” (at para. 56) (emphasis added)

40. At para 61, it stated:

“The objective of Directive 2005/85 is to establish a common system of safeguards serving to ensure that the Geneva Convention and the fundamental rights are fully complied with. The right to an effective remedy is a fundamental principle of EU law. In order for that right to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons. It is also within the framework of that remedy that the national court hearing the case must establish whether the decision to examine an application for asylum under an accelerated procedure was taken in compliance with the procedures and basic guarantees laid down in Chapter II of Directive 2005/85, as provided for in Article 23(4) of the directive.”

41. In *Gaydarov v. Direktor na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti (Case C-430/10)* EU: C 2011:749, [2011] E.L.R. 1-11637, the CJEU opined that an effective remedy:

"...must permit a review of the legality of the decision at issue as regards matters of both fact and law...In order to ensure that such review by the courts is effective, the interested party must be able to obtain the reasons for the decision taken in relation to him, either by reading the decision itself or by requesting and obtaining notification of those grounds, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information..." (at para. 41)

42. I have already observed that at national level the question of what constitutes an effective remedy has been considered by the courts. In *N.M. v. Minister for Justice*, the issue for consideration was whether the High Court was correct in holding that the internal review procedure provided by the Minister against adverse decisions at first instance refusing to admit a failed asylum seeker back into the asylum system did not comply with the effective remedy requirements of Article 39 of Council Directive 2005/85/EC of 1 December 2005, O.J. L 326/13, 13.12.2005 ("the Procedures Directive") as implemented by the European Communities (Asylum Procedures) Regulations 2011 (S.I. No. 51/2011).

43. Having opined that judicial review as a remedy has been shaped by the seminal Supreme Court judgment in *Meadows* and two contemporary High Court judgments namely, *I.S.O.F. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457 and *Efe v. Minister for Justice* [2011] IEHC 214, [2011] 2 I.R.798, Hogan J. stated, at para.53:

"In the light of this trilogy of case law – Meadows v. Minister for Justice [2010] IESC 3, [2010] 2 I.R. 701, I.S.O.F v. Minister for Justice, Equality and Law Reform [2010] IEHC 457, (Unreported, High Court, Cooke J., 17 December 2010) and Efe v. Minister for Justice [2011] IEHC 214, [2011] 2 I.R. 798 – it is clear that what might be termed modern, post- Meadows -style judicial review will satisfy the effective remedy requirements of article 39(1) of the Procedures Directive. As I have already stated, what is clear from the judgment in Samba Diouf v. Ministre du Travail (Case C-69/10) [2011] E.C.R. I-7151 at para. 70, p. 7203, is that what is necessary is that 'the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review'. Whatever might have been the situation within the narrow and artificial confines of O'Keefe v. An Bord Pleanála [1993] 1 I.R. 39, it is clear from other important authorities that the decision of the Minister must satisfy the requirements of factual sustainability (The State (Lynch) v. Cooney [1982] I.R. 337) and the reasons for that decision can furthermore be fully scrutinised within the parameters of the judicial review procedure (Meadows v. Minister for Justice). There is, in any event, well-established case law whereby the court can quash decisions by judicial review for material error of facts: see generally, Daly, 'Judicial Review of Factual Error in

Ireland' (2008) 30(1) *Dublin University Law Journal* 187; *Hill v. The Criminal Injuries Comp. Tribunal* [1990] *I.L.R.M.* 36; *A.M.T. v. Refugee Appeals Tribunal* [2004] *IEHC* 219, [2004] 2 *I.R.* 607; *V.C.B.L. v. Refugee Appeals Tribunal* [2010] *IEHC* 362, (Unreported, High Court, Cooke J., 15 October 2010) and *H.R. v. Refugee Appeals Tribunal* [2011] *IEHC* 151, (Unreported, High Court, Cooke J., 15 April 2011)."

44. In *N.M.*, the trial judge had found that judicial review could not be an effective remedy within the meaning of Article 39(1) of the Procedures Directive because it was not a remedy "capable of reversing the first instance refusal". He also found that the fact that the court could only annul the decision and remit it for consideration and that the court was further confined to the information available to the decision maker mitigated against judicial review as an effective remedy. Hogan J. addressed these findings by way of a detailed analysis of both the national and EU jurisprudence on the effectiveness of judicial review as a remedy:

"[54] In his judgment in the present case ([2014] *IEHC* 638), Barr J. found, at para. 43, p. 28, that the essence of the reason why the judicial review remedy was not, in his opinion, an effective remedy within the meaning of article 39(1) was because it was not a remedy which was 'capable of reversing the first instance refusal' in the sense of substituting its own decision for that of the original decision-maker. Barr J. also drew attention to the other limitations inherent in the judicial review process, such as the fact that the court could only annul the decision and remit the matter for further consideration. He also observed that the court was further confined to the information which was before the decision maker at the time of the decision, before adding at pp. 42 and 43:-

'91. ... It has been stated on many occasions that the courts can only review the process leading to the impugned decision, rather than review the merits of the decision itself. The court is not an appeal court and is not free to substitute its own substantive findings for those of the decision maker. The court cannot reverse the decision of the decision maker; it can only annul its decision. The court can only interfere if it is satisfied that there was an error of law, or an error of fact on the face of the record, or there was some unfairness in the procedure adopted or if the decision was irrational in that there was no evidence supporting the finding made by the decision.'

[55] All of this is in its own way true. But, perhaps, with respect, this passage may be thought to underplay the scope of contemporary, post— *Meadows v. Minister for Justice* [2010] *IESC* 3, [2010] 2 *I.R.* 701 judicial review. While the judicial review court cannot review the merits of the decision, it can nonetheless quash for unreasonableness or lack of proportionality (as in *Meadows v. Minister for Justice* [2010] *IESC* 3) or where the decision simply strikes at the substance of constitutional or EU rights: see, e.g., *P.S. v. Minister for Justice, Equality and Law Reform* [2011] *IEHC* 92, (Unreported, High Court, Hogan J., 23 March 2011);

O'Leary v. Minister for Justice [2012] IEHC 80, [2013] 1 I.L.R.M. 509. The court can further examine the conclusions reached and ensure that they follow from the decision-maker's premises. The court can further quash for material error of fact.

[56] While it is true, therefore, that judicial review cannot be equated with an appeal simpliciter, it seems clear from Samba Diouf v. Ministre du Travail (Case C-69/10) [2011] E.C.R. I-7151 that this is not what article 39(1) requires. It is, after all, at least implicit in recital 27 to the Procedures Directive and article 39(2) that each member state must remain free to organise its own supervisory procedures. Article 39 is not, therefore, prescriptive regarding the choice of remedy and it is open in principle, therefore, to each member state to choose as between some form of appeal on the one hand and judicial review on the other. In any event, the Court of Justice said as much in Samba Diouf v. Ministre du Travail (Case C-69/10) in holding that article 39 did not require member states to provide for a 'specific remedy'.

[57] To this article 39 imposes only one – albeit, critical – requirement, namely, that the remedy in question must remain an effective one. As Samba Diouf v. Ministre du Travail (Case C-69/10) [2011] E.C.R. I-7151 itself makes clear, this means that the supervisory jurisdiction of the High Court must be ample enough to ensure that 'the reasons which led the competent authority to reject the application for asylum as unfounded ... may be the subject of a thorough review by the national court'.

[58] I accept that the 'no relevant material' standard prescribed by the Supreme Court in O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 would not satisfy the Samba Diouf v. Ministre du Travail (Case C-69/10) [2011] E.C.R. I-7151 requirements, since in practice it would not be possible to subject the reasons given by the decision-maker to a 'thorough review' by the judicial review judge if that were indeed the applicable test. Nevertheless, for the reasons essentially set out by Cooke J. in I.S.O.F. v. Minister for Justice, Equality and Law Reform [2010] IEHC 457, (Unreported, High Court, Cooke J., 17 December 2010) and by me as a judge of the High Court in Efe v. Minister for Justice [2011] IEHC 214, [2011] 2 I.R. 798, I consider that O'Keeffe v. An Bord Pleanála test can no longer be applied to judicial review applications in asylum matters such as the present one in which the protection of either constitutional rights or EU law rights are engaged. The Supreme Court has, in any event, made this clear: this, at least, is the clear implication of major post- O'Keeffe v. An Bord Pleanála decisions such as Clinton v. An Bord Pleanála (No. 2) [2007] IESC 19, [2007] 4 I.R. 701 and Meadows v. Minister for Justice [2010] IESC 3, [2010] 2 I.R. 701. Even if that were not so, this court's duty of loyal co-operation with the requirements of EU law would, in any event, require us to ensure that our domestic law of judicial review is remoulded in this manner in order to accommodate the requirements of article 39(1).

[59] Subject, nevertheless, to these quite critical considerations, I nevertheless am of the view that Barr J. fell into error in concluding that the remedy of judicial review was in itself an ineffective remedy for the purposes of article 39. I accept, of course, that the remedy of judicial review has inherent limitations of the kind identified by Barr J. Where I respectfully part company with Barr J. is that I do not see that these limitations (e.g., no power to substitute findings of facts for those of the decision-maker and a power of annulment only) as otherwise depriving judicial review of the character of an effective remedy. What is critical is that – as Samba Diouf v. Ministre du Travail (Case C-69/10) [2011] E.C.R. I-7151 makes clear – the judicial review court can subject the reasons of the decision-maker to thorough review.”

For the reasons set out above, Hogan J. was satisfied that the required “thorough review” could be achieved using “contemporary judicial review standards”.

45. In *A.A.A. v. Minister for Justice* [2017] IESC 80, it fell to the Supreme Court to consider whether judicial review was an effective remedy as regards the subsidiary protection regime in place pursuant to the 2006 Regulations. The issue was distilled by Charleton J., as follows: -

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

With reference to N.M., he went on to state:

“26. In N.M. Hogan J. held that post- Meadows, judicial review was sufficiently flexible to accommodate the 'thorough review' requirements of Diouf, even if the earlier 'no evidence' standard required by O'Keefe would not. There is, however, no authority for any wider proposition to the effect that only a right of appeal from the Minister's decision would amount to an effective remedy in this context, and Diouf is an authority to the contrary. In the absence of any express provision in the Directive itself requiring Member States to provide for a right of appeal, as distinct from judicial review or something approximating to judicial review, any other conclusion would seem at variance with the fundamental principle of EU law of national procedural autonomy. Thereby, Member States are entitled to determine their own legal procedures, subject to the principles of equivalence and effectiveness. While the full extent of the interaction of proportionality in decision making with the duty to act reasonably, as cast on administrative and quasi-judicial bodies, should await scrutiny in an appropriate case, every case remains fact specific. On this appeal, there was no fact demonstrated in any decision affecting the applicants as being so unreasonable as to require it to be quashed or so lacking in proportion to the evidence presented as to fail to be reasonable in itself.”

46. Most recently, in *V.J. v. Minister for Justice* [2019] IESC 75, the Supreme Court again rejected the contention that judicial review was not an effective remedy against a refusal of subsidiary protection. O'Donnell J. opined, at para. 67, that the appellants in *V.J.* faced the substantial obstacle that judicial review as an effective remedy:

"appeared to have been addressed comprehensively and definitively by the judgment of this court in A.A.A..., referring with approval to the prior decision of the Court of Appeal in N.M. v. Minister for Justice ..."

47. In the appeal arguments made to the Supreme Court in *V.J.*, reliance was placed on the decision of the CJEU in *Secretary of State for the Home Department v. Banger* (Case C-89/17) EU: C: 2018: 570, [2019] 1 C.M.L.R. 153. *Banger* is also relied on by counsel for the appellants in the within appeals.
48. The CJEU ruling in *Banger* came about in the following circumstances: For a period of time after the introduction in England and Wales of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), which transposed into United Kingdom law Directive 2004/38/EC of 24 April 2004, O.J. L158/77, 30.4.2004 ("the Citizenship Directive"), it had been assumed that the relevant provisions of these Regulations permitted an appeal to the tribunal system from a decision of the Secretary of State for the Home Department refusing a residence card to a person claiming to be an extended family member. However, in *Sala (EFMs: Right of Appeal)* [2016] UKUT 441 (IAC), [2017] Imm. A.R. 141, the Upper Tribunal concluded on an interpretation of the Nationality Immigration and Asylum Act 2002, and implementing EEA Regulations 2006, that an appeal did not exist. That decision was subsequently disapproved of by a judgment of the Court of Appeal of England and Wales in *Khan v. Secretary of State for the Home Department* [2017] EWCA Civ 1755, [2018] 1 W.L.R. 1256, which was itself specifically approved by the Supreme Court of the United Kingdom in *S.M. (Algeria) v. Entry Clearance Officer* [2018] UKSC 9, [2018] 1 W.L.R. 1035. New regulations came into force in 2019 providing for an appeal.
49. There were however some cases not covered by the new regulations, *Banger* being one such case. The factual matrix in *Banger* was as follows: Ms Banger had moved with her partner (a UK national) from the Netherlands to the UK but was refused a residence card on the ground that she was neither a spouse nor a civil partner of a UK national. She appealed successfully to the First tier Tribunal against the refusal. The Secretary of State for the Home Department was subsequently granted permission to appeal to the Upper Tribunal on the ground that there had been an error of law. That Tribunal referred a number of questions to the CJEU relating to Ms Banger's status as an unmarried partner of an EU citizen. The Upper Tribunal had also noted that a differently constructed chamber of the tribunal had already held that a person who had been refused a residence card as an extended family member had no right of appeal and thus, by its fourth question to the CJEU the Upper Tribunal sought to ascertain whether such a rule was compatible with the Citizenship Directive.

50. The decision of the CJEU on this question is comprehensively addressed by O'Donnell J. in V.J.:

"69. ...The fourth issue referred by the Upper Tribunal to the CJEU was therefore, whether a rule of national law which precluded an appeal to a court or tribunal against the decision of the executive refusing to issue a residence card to a person claiming to be an extended family member was compatible with Directive 2004/38. As the court observed, that question had to be understood in the context of the previous decision of the Upper Tribunal in Sala. At para. 42 of the judgment, the court observed that the question therefore raised 'not the possible absence of review by a court for those persons, but whether Directive 2004/38 requires a redress procedure whereby matters of both fact and law may be reviewed by a court'. The court observed at para. 48 that the provisions of Directive 2004/38 had to be interpreted in a manner that complied with the requirements flowing from Article 47 CFREU, so that persons must have available to them an effective judicial remedy against the decision in question, permitting a review of the legality of that decision as regards matters of both fact and law in the light of European Union law, citing in that respect the judgment in Gaydarov v. Direktor na Glavna direksia 'Ohranitelna politsia' (Case C-430/10) EU:C:2011:749. The court expressed its conclusion in the following passage:-

'49 Consequently, it must be found that the procedural safeguards provided for in Article 31(1) of Directive 2004/38 are applicable to the persons envisaged in point (b) of the first subparagraph of Article 3(2) of that directive.

50 As regards the content of those procedural safeguards, according to the Court's case-law, a person envisaged in Article 3(2) of that directive is entitled to a review by a court of whether the national legislation and its application have remained within the limits of the discretion set by that directive (judgment of 5 September 2012, Rahman and Others, C-83/11, EU:C:2012:519, paragraph 25).

51 As regards its review of the discretion enjoyed by the competent national authorities, the national court must ascertain in particular whether the contested decision is based on a sufficiently solid factual basis. That review must also relate to compliance with procedural safeguards, which is of fundamental importance enabling the court to ascertain whether the factual and legal elements on which the exercise of the power of assessment depends were present (see, by analogy, judgment of 4 April 2017, Fahimian, C-544/15, EU:C:2017:255, paragraphs 45 and 46). Those safeguards include, in accordance with Article 3(2) of Directive 2004/38, the obligation for those authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.

52 *In the light of the foregoing considerations, the answer to the fourth question is that Article 3(2) of Directive 2004/38 must be interpreted as meaning that the third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.'*

70. *It is apparent from the judgment of the court that it does not purport to extend, alter or reverse the existing case law, but rather emphasises it. Furthermore, inasmuch as any principle of the interpretation of Article 47 CFREU is to be deduced from the judgment, it is plain that what is required is a review of the decision which is capable of ascertaining whether the refusal decision was 'based on a sufficiently solid factual basis'. While requiring, therefore, a searching review, the judgment plainly stops short of requiring an appeal which would involve a rehearing and a substitution of the views of the appellate body for that of the decision-maker."*

Ultimately, O'Donnell J. was satisfied to conclude that the CJEU had not departed from its earlier jurisprudence, stating:

" Given, therefore, the terms of the judgment in Secretary of State for the Home Department v. Banger (Case C-89/17) [2019] 1 C.M.L.R. 153, and the fact that it is not presented as a departure from the prior case law of the court, all of which has been considered in the recent Irish decisions, the judgment does not, in my view, raise any sufficient basis for questioning the law that the decisions of the Irish courts only recently laid down: as noted above, in A.A.A. v. Minister for Justice [2017] IESC 80 (Unreported, Supreme Court, 21 December 2017), and N.M. v. Minister for Justice [2016] IECA 217, [2018] 2 I.R. 591, it was held that judicial review as is available in Ireland is an effective remedy for the purposes of Article 47 CFREU. It is perhaps noteworthy that in F.M. v. The Minister for Justice and Equality [2018] IEHC 274, (Unreported, High Court, Humphreys J., 17 April 2018), the High Court came to a similar conclusion in relation to an argument advanced on the basis of the opinion of Advocate General Bobek in Banger." (at para. 70)

51. The reference O'Donnell J., at para. 70, to *F.M. v. Minister for Justice* [2018] IEHC 274 is in fact a reference to the judgment in *F.M.'s* case as is now appealed to this Court.
52. In his written submissions to this court, as authority for the proposition that an effective remedy meant an appeal from the first decision and not judicial review counsel for the appellants relied on para. 32 of the judgment of the CJEU in *M. v. Minister for Justice & Equality* [2017] (Case C-560/14) 3 C.M.L.R. 2:

"...the right to be heard must allow that authority to investigate the matter in such a way that it adopts a decision in full knowledge of the facts, while taking account of all relevant factors, and to state reasons for that decision adequately, so that, where appropriate, the applicant can exercise his right of appeal..."

53. To my mind, the reference to the word "appeal" in the foregoing paragraph is not enough for this Court to conclude that the CJEU had resiled from its pronouncements in *Diouf* and *Gadarov* that what is required is "a thorough review", which the Supreme Court in *A.A.A.* and *V.J.* has found to be eminently capable of being met by the remedy of judicial review. Furthermore, I adopt O'Donnell J.'s conclusion (in *V.J.*) that, in *Banger*, the CJEU did not depart from its earlier jurisprudence in *Diouf* and *Gadarov*.
54. Accordingly, having considered the submissions advanced in the within appeals against the background of the very clear jurisprudence that judicial review constitutes an effective remedy, I perceive no basis upon which the trial judge's rejection of the appellants' effective remedy argument can be set aside.

(iii) Whether the regime in place under which the appellants were permitted to apply for subsidiary protection was compatible with EU law

55. Pursuant to this ground of appeal (upon which the appellants primarily rely) it is contended that the procedure in place at the time their subsidiary protection applications were considered was incompatible with EU law. It is contended that the process employed by the Minister was flawed because the subsidiary protection process was "enmeshed" with the deportation process in that both the appellants' subsidiary protection applications and their leave to remain applications had to be made together. More particularly, it is submitted that the absence of a process whereby the appellants could apply for subsidiary protection at the same time as applying for refugee status breached EU law.
56. In aid of his submission that the appellants are entitled to *certiorari* and /or declaratory relief, counsel relies on the judgment of the CJEU in *H.N. v. Minister for Justice (Case C-604/12)* EU:C:2014:302, [2014] 1 W.L.R. 3371. It is argued that the import of the CJEU ruling in *H.N.* has not been fully understood or adhered to in this jurisdiction. It is also contended that while consideration was given at paras. 46 and 47 of *V.J.* to various aspects of the *H.N.* judgment, no consideration was accorded to what counsel styled the "operative" part of the CJEU's judgment in *H.N.* Counsel requests the court to adjudicate on the legality of the regime in place when the appellants' subsidiary protection applications were considered by reference to the operative part of the CJEU judgment in *H.N.*
57. To put the appellants' argument in context, it is necessary, firstly, to consider what was decided by the CJEU in *H.N.*
58. The factual backdrop to the *H.N.* preliminary reference was as follows. In 2009, Mr. N., a Pakistani national, applied for subsidiary protection in this jurisdiction without first having made an application for refugee status. He was informed that it was not possible to consider his application as under Irish law the basis for making an application for

subsidiary protection status was that the person applying had been refused refugee status. Mr. N sought judicial review of the Minister's decision, arguing that the Qualifications Directive gave him the right to make an autonomous application for subsidiary protection. After judicial review was refused, he appealed to the Supreme Court. That court stayed the proceedings and referred the following question to the CJEU:

"Does...[the Qualifications Directive]..., interpreted in the light of the principle of good administration in the law of the European Union and, in particular, as provided by Article 41 of the Charter..., permit a Member State to provide in its law that an application for subsidiary protection status can be considered only if the applicant has applied for and been refused refugee status in accordance with national law?"

59. Noting that the Qualifications Directive refers to two separate systems of protection, namely the system governing refugee status and that relating to subsidiary protection, the CJEU, held, at para 36: -

"It follows that [the Qualifications Directive] does not preclude national legislation which provides that the requirements for granting refugee status must be considered before those relating to subsidiary protection."

60. It went on to opine:

"44. Nevertheless, the effect of legislation such as that at issue in the main proceedings is that a third country national seeking only subsidiary protection will necessarily be required to follow two separate procedural stages, while the introduction of a two-stage procedure for obtaining international protection risks extending the duration of the procedure and, accordingly, delaying the determination of the application for subsidiary protection.

45. The requirement for genuine access to subsidiary protection status means that, first, it should be possible to submit the application for refugee status and the application for subsidiary protection at the same time and, second, the application for subsidiary protection should be considered within a reasonable period of time, which is a matter to be determined by the national court.

...

51. It is therefore necessary to ascertain whether the right to good administration precludes a Member State from including in its national law a procedural rule to the effect that an application for subsidiary protection must be covered by a separate procedure and can be made only after an asylum application has been refused.

52. As regards, in particular, the requirement for impartiality, that requirement encompasses, inter alia, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the national

authorities concerned (see, by analogy, Case C-439/11 P Ziegler v Commission EU:C:2013:513, paragraph 155).

53. It should be noted, first of all, that in circumstances such as those in the main proceedings, the fact that, before commencing the examination of an application for subsidiary protection, the national authorities inform the applicant that they are considering making a deportation order cannot, of itself, be construed as a lack of objective impartiality on the part of those authorities.

54. It is in fact common ground that the reason for that disclosure on the part of the competent authorities is that it has been found that the third country national does not qualify for refugee status. That finding does not, therefore, mean that the competent authorities have already adopted a position on whether that third country national satisfies the requirements for being granted subsidiary protection.

55. Accordingly, the procedural rule at issue in the main proceedings is not at odds with the requirement of impartiality pertaining to the right to good administration.

56. Nevertheless, that right ensures, in the same way as the requirements imposed by the principle of effectiveness referred to at paragraphs 41 and 42 above, that the entire procedure for considering an application for international protection does not exceed a reasonable period of time, which is a matter to be determined by the referring court."

Accordingly, the question referred was answered in the following terms:

"57. In the light of all the foregoing considerations, the answer to the question referred is that Directive 2004/83, the principle of effectiveness and the right to good administration do not preclude a national procedural rule, such as that at issue in the main proceedings, under which an application for subsidiary protection may be considered only after an application for refugee status has been refused, provided that, first, it is possible to submit the application for refugee status and the application for subsidiary protection at the same time and, second, the national procedural rule does not give rise to a situation in which the application for subsidiary protection is considered only after an unreasonable length of time, which is a matter to be determined by the referring court."

In these proceedings, the appellants rely in no small measure on para. 57, which counsel contends is the operative portion of the CJEU's judgment.

61. On 31 July 2012, some five months or so prior to the Supreme Court's reference to the CJEU in *H.N.*, leave was granted by Cooke J. in *V.J. v. Minister for Justice and Equality* [2012] IEHC 337 for the applicant to seek judicial review of the refusal of subsidiary protection. The leave application was based on the argument that the "enmeshment" of the subsidiary protection scheme with the deportation/leave to remain procedure was in

breach of EU law. Cooke J. referred to the argument being advanced to vitiate the decision in the following terms:

"16. The primary ground advanced is that the decision is vitiated by an excessive delay in making the determination on the application. Counsel for the applicant submitted that the delay was so great that it is, per se, sufficient to invalidate the determination irrespective of the demonstration of any impact upon the substantive content of the decision by virtue of elapsed time. It is also asserted that by the time the decision was made, the lapse of time was such that the country of origin information relied upon in the application was out of date. Furthermore, before reliance was placed on any later information it should have been put to the applicant for comment or rebuttal in order to comply with the principle of audi alteram partem."

He considered the concept of "enmeshment" as follows:

"25. It seems questionable whether the concept of "enmeshment" is one known to the vocabulary of administrative law. What is being alluded to here, however, is the fact that in the way in which the Qualifications Directive has been implemented by the 2006 Regulations, the opportunity to apply for subsidiary protection has been incorporated into the procedure leading to the making of a deportation order under s. 3 of the Immigration Act . Regulation 4(1) of the 2006 Regulations requires that the notification given by the Minister of a proposal under s. 3(3) of the Act of 1999, to make [a] deportation order in respect of a failed asylum seeker is to include a statement that if the asylum seeker considers that he or she is a person eligible for subsidiary protection, 'he or she may, in addition to making representations under s.(3)(3)(b) of that Act, make an application for subsidiary protection to the Minister within the fifteen day period' stipulated in the notification.

26. In typical if not all cases, the notification under s. 3(3) is given in what is referred to as the 'three options letter' in which the failed asylum seeker is informed that the Minister proposes to make a deportation order but offers the asylum seeker a choice between leaving the State voluntarily before any order is made; agreeing to submit to the making of the order and, alternatively, applying for temporary leave to remain and additionally making an application for subsidiary protection. It is argued that by placing the entitlement to apply for subsidiary protection within the context of the choice to be made between these options, the combined effect to Regulation 4(1) and s. 3 is to place an inhibition on the making of an application for subsidiary protection which is incompatible with the scheme of the Qualifications Directive and general principles of European Union law."

Cooke J. duly went on to formulate the ground upon which he was prepared to grant leave:

"By confining the right to apply for subsidiary protection to the circumstance in which the asylum seeker's entitlement to remain lawfully in the State pursuant to s.

9(2) of the Refugee Act , has expired and a decision has been taken to propose the deportation of the applicant under s. 3(3) of the Immigration Act , Regulation 4(1) of the 2006 Regulations in conjunction with s. 3 of the said Act of 1999, has the effect of imposing a precondition or disadvantage upon a subsidiary protection applicant which is ultra vires Council Directive 2004/83/EC of the 29th April, 2004, and is incompatible with general principles of European Union law.” (at para. 27)

62. In October 2017, the High Court (Humphreys J.) made Orders permitting the within appellants to amend their respective statements of grounds by including the leave ground formulated by Cooke J. in *V.J.*

63. Subsequently, however, in his various judgments the subject of the within appeals, Humphreys J. went on to reject the Cooke J. ground. At para. 24 of his judgment in *F.M. v. Minister for Justice and Equality & Ors* [2018] IEHC 274, he stated:

“I have already rejected that point in N.M. v. Minister for Justice and Equality [2018] IEHC 186 (Unreported High Court, 27th February, 2018) following V.J. and M.L. v. Minister for Justice and Equality [2017] 570 (Unreported McDermott J., 20th June, 2017).”

64. In *N.M.*, Humphreys J. had rejected the enmeshment argument in the following terms:

“9. The complaint is made that under the old procedure, prior to the International Protection Act 2015, the subsidiary protection application was entwined or ‘enmeshed’ with the deportation order procedure in the sense that it could only be made after a proposal to deport. There is no illegality in such a procedure; that is a legislative choice. It does not put any meaningful inhibition whatsoever on the making of a subsidiary protection application. Leave was granted on this point by Cooke J. in V.J. (Moldova) v. Minister for Justice and Equality [2012] IEHC 337 (Unreported, High Court, 31st July, 2012). The substantive decision in that case was given by McDermott J. in M.L. v. Minister for Justice and Equality [2017] IEHC 570 (Unreported, High Court, 20th July, 2017), which dealt with three separate cases together. This point is addressed at paras. 40 to 60 and I follow that approach...

10. Mr. O’Shea submits that the application of the principle of equivalence or effectiveness, as outlined in Case C 429/15 Danqua v. Minister for Justice & Ors. (29th October, 2016) requires certiorari to be granted, but that does not follow. Danqua deals with a separate issue, namely the fourteen-day time limit. While the overall principle of equivalence and effectiveness is well-established, the applicant in any given case has to show that the particular rule at issue is in breach of the equivalence or effectiveness principles. Here the applicant has not done so. In any event the whole argument is nonsense on the facts because the applicant made a subsidiary protection application and had it considered. She was not denied an effective examination of EU law rights.”

65. As can be seen, in rejecting the enmeshment argument as canvassed in *F.M.* and the other cases under appeal here, Humphreys J. not only followed his own decision in *N.M. v. Minister for Justice* but also adopted the reasoning of McDermott J. in *M.L. v. Minister for Justice and Equality* [2017] IEHC 570 (which incorporated the *V.J.* case). In *M.L.*, McDermott J. had not only refused judicial review which had been sought on the leave ground formulated by Cooke J. in *V.J.* but also on the similar and more expansive ground upon which Clark J. in a decision of 12th October 2012 had granted leave in *M.L. v. Minister for Justice* [2012] IEHC 485.
66. McDermott J. addressed the Cooke J. ground in the following terms:

"54. The court is satisfied that the principle of effectiveness under European Union Law in respect of subsidiary protection requires that the right to apply for subsidiary protection be secured 'in concrete terms'. It is abundantly clear from the evidence that each of the applicants was given a full opportunity to make an application for subsidiary protection after the refusal of their respective applications for refugee status...

55. In this case each applicant had a full opportunity to make submissions in respect of their applications for subsidiary protection. There is no evidence to support the proposition that the exercise of their rights was made 'impossible' or 'excessively difficult' in a manner that would contravene European Union Law. There is nothing in the affidavits submitted on behalf of the applicants to indicate how or to what extent they were inhibited or prevented from exercising the right to make an application for subsidiary protection because of the proposal to consider their deportation.

56. Each application was considered in advance of the application for leave to remain. It was never envisaged that the applicants would be deported prior to the completion of the subsidiary protection process or that a decision would be made about their deportation prior to the conclusion of that process. That was made explicitly clear to each of the applicants and it was the process followed on the evidence adduced. The applications for leave to remain were made at the same time under s. 3 of the Immigration Act 1999 as amended. However, the applicants could not be deported unless a deportation order was made against them. This required a separate consideration of their applications for leave to remain on distinct criteria which were different to those upon which subsidiary protection was determined...

As to the inevitable delays that had ensued in the subsidiary protection process itself, McDermott J. opined:

"65. Article 41 of the Charter of Fundamental Rights is entitled 'right to good administration' and provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable period of time by the institutions, bodies, offices and agencies of the Union. It is undoubtedly the case

that the election by the State to provide a two stage procedure in respect of applications for asylum and subsidiary protection gives rise to inevitable delay. In respect of the first and second applicants more than two years passed between the consideration of the application for asylum and subsidiary protection. In M.M. v. the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Case C-277/11 Opinion of the Advocate General, 26th April 2012) Advocate General Bot opined that a period of two years and three months in respect of that applicant's claim for international protection was 'manifestly unreasonable' based on the right to good administration which was one of the general principles of European Union Law.

'That length of time seems to me to be manifestly unreasonable. Although in Ireland examination of the application for subsidiary protection is not subject to the procedural rules mentioned in Article 23 (2) of the Directive 2005/85 - which provides that member states must ensure that the procedure for examining applications for international protection is concluded as soon as possible and, where a decision cannot be taken within six months, that the applicant is either informed of the delay or receives information on the timeframe... the fact remains that the competent national authority is obliged to ensure, when it adopts a decision falling within the scope of EU Law, observance of the right of the person concerned to good administration, which constitutes a general principle of EU Law.'

66 It is to be noted that the specific grounds upon which leave was granted do not contain a ground relating to delay arising from the operation of a two stage process. No specific prejudice has been pleaded in relation to the delay in respect of the subsidiary protection decisions. These applications should be determined with reasonable expedition having regard to the circumstances of the particular case. Undoubtedly, following the initiation of judicial review proceedings in each of these cases considerable delay followed, created partly by the court permitting an amendment of the grounds to cover the issues raised in M.M. which had been initially adjourned on the application for leave. The issue raised in M.M. was subsequently the subject of two references to the CJEU. The court has the benefit of the judgment of the advice of the CJEU in respect of the second reference and following further argument is now in a position to adjudicate finally on the same related issue which arises in these cases. The court is not satisfied that the applicants are entitled to relief on this ground."

67. Although in *V.J.*, McDermott J. rejected the enmeshment ground, he granted *certiorari* of the subsidiary protection decisions on the grounds that the applicants were not given the opportunity to address previous adverse credibility findings and the decision-maker's failure to consider whether an oral interview or hearing was necessary. (at paras. 92-94) The Minister duly appealed these findings. McDermott J.'s rejection of the enmeshment ground was the subject of a cross-appeal by the *V.J.* applicants.

68. These appeals culminated in the decision of the Supreme Court in *V.J. v. Minister for Justice* [2019] IESC 75 already referred to above. The Supreme Court did not uphold McDermott J.'s findings on the oral hearing and credibility issues. O'Donnell J. held that McDermott J.'s conclusions could not stand in light of the judgment rendered by the Supreme Court in *M.M. v. Minister for Justice* [2018] IESC 10, [2012] 1 I.L.R.M. 361 which followed on from the referral the Supreme Court itself had made to the CJEU, as discussed earlier in this judgment.

69. For the purposes of the cross-appeal in *V.J.*, it was argued that the procedure under the 2006 Regulations was unfair because the applicants were only entitled to apply for subsidiary protection after their applications for refugee status had been determined negatively.

70. O'Donnell J. addressed the enmeshment arguments in the following terms:

*"46. It is contended that the procedure under the 2006 Regulations was unfair because the applicants were only entitled to apply for subsidiary protection after the application for refugee status had been determined negatively. In this regard, it is worth remembering that refugee status and the subsidiary protection of an applicant, while very similar, are distinct concepts. Refugee status, speaking generally, arises from individual persecution by State actors in consequence of the ethnic origin, religious beliefs, political alliance or orientation of people or of groups within a society. Clearly, that may involve violence or other grave threats, but these arise or are a real threat because of what people either are, identify themselves as, or are perceived to be. Subsidiary protection, on the other hand, arises where someone comes to the State and has a well-founded fear of violence in their country of origin. That need not be because of their real or perceived status in their country of origin but because of the absence of resort to such aspects of civic society as police, courts and army which operate as a general threat to the well-being of an applicant. While civil war may be an example of such a state, the difference is in the generalised threat to life. Hence, a person applying for refugee status will no doubt focus on violence, but there the test also involves the ostensible reason they say they are targeted. In making a subsidiary protection application, that targeting need not form part of the contention since generalised violence is the focus. Although therefore they are closely related concepts they are distinct. Since these proceedings were commenced and this point formulated, this court has delivered its decision in *Nawaz v. Minister for Justice* [[2015] IESC 30], following the reference to the CJEU in *H.N. v. Minister for Justice, Equality and Law Reform (C-604/12)* [2014] 1 W.L.R. 3371, which covers much of this ground. It was observed there that since refugee status provides greater protection for the individual than subsidiary protection, and since an applicant will not necessarily be in the best position to identify the form of international protection to which he or she may be entitled, it was in principle permissible for competent authorities to determine the status most appropriate to the applicants' situation. It followed, therefore, that an application for subsidiary protection should not in principle be*

considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for a refugee status. At para. 36 of its judgment, the CJEU stated:-

'36. It follows that Directive 2004/83 does not preclude national legislation which provides that the requirements for granting refugee status must be considered before those relating to subsidiary protection.'

47 In H.N., the CJEU also went on to consider other aspects of the process, and, in particular, considered there was a requirement that the decision be made within a reasonable time. Furthermore, the right to good administration encompassed objective impartiality. That, however, was not breached where a national authority informed the applicant prior to considering the application for subsidiary protection that the authority was considering making a deportation order.

...

48 It is the case that a considerable time period could and did elapse between the decision on refugee status and any subsequent decision on subsidiary protection. In these cases, a period of up to two years was involved. However, the applicants cannot establish any prejudice in that regard. Even if a court concluded that the delay was inordinate and in breach of the applicants' rights under national law and/or European Union law, it would not necessarily follow that the appropriate remedy would be an order quashing the decision actually made. At paras. 65 and 66 of his judgment, the learned High Court judge rejected the applicants' claim in this regard, and in my view he was correct to do so.

49 It is perhaps worth observing at this point that the bifurcated regime applicable in Ireland during the relevant time was cumbersome, ineffective, and an easy target for legal challenges. It was therefore the subject of considerable delays. All these factors made the system inefficient and unsatisfactory, both from the point of view of the administration, and of any applicant involved in the process. For these reasons, it was the subject of criticism in a number of decisions. Inefficiency however is not necessarily the same as fundamental unfairness. In principle, a two-step process with separate decision-making procedures and decision-makers, with the possibility of commenting on and addressing the finding made in the asylum process in the context of the subsidiary protection decision, and the possibility of legal challenges at each stage, is not, in principle, self-evidently unfair to an applicant. Valid criticisms of inefficiency and delay can be levelled at the system, but at the same time, a perverse feature of the system was that, however frustrating the delays were for applicants, they often had the effect of improving any claim for humanitarian leave to remain. The fact that the procedure could be rightly criticised on grounds of inefficiency, does not automatically mean that it lacked all legality."

71. As already referred to, it is the appellants' contention that, in *V.J.*, the Supreme Court did not properly adhere to the ruling of the CJEU in *H.N.* and did not address the specific ground upon which Cooke J. granted leave in *V.J.* (in respect of which the appellants here were also granted leave), which was whether confining the right to apply for subsidiary protection to after refugee status was refused and a decision taken to propose deportation had the effect of imposing a precondition or disadvantage upon a subsidiary protection applicant that was *ultra vires* the Qualification Directive. Counsel asserts that O'Donnell J. failed to apply any consideration to the argument that the undoubted incompatibility with EU law of the subsidiary protection process as it stood at the relevant time entitled the applicants in *V.J.* to relief. This is the argument also advanced in these appeals. Moreover, it is argued that insofar as it is suggested on behalf of the Minister that the appellants had to establish that they were prejudiced as a result of the breach, that is not accepted: counsel asserts that the breach of EU law, of itself, is sufficient to warrant *certiorari* of the impugned subsidiary protection decisions.
72. It is submitted that it is beyond doubt that the system in operation in the State at the relevant time, purportedly under the Qualifications Directive, was incompatible with and precluded by EU law and had the consequence of prolonging the process under which the appellants sought to assert their right to claim subsidiary protection. It is argued that the appeals should be allowed, as a matter of law, on this discrete basis and that the trial judge erred in not so holding.
73. In *V.J.*, a period of up to two years elapsed between the decisions on refugee status and the subsequent decisions on subsidiary protection. This was acknowledged by O'Donnell J. to be "*a considerable time period*" (at para. 48). However, as can be seen, he went on to state that even if a court concluded that the delay was inordinate and in breach of rights under national law and/or EU law it would not necessarily follow that the appropriate remedy would be *certiorari*, in the absence of any prejudice in that regard being established.
74. Counsel argues that as a matter of EU law it was incumbent on the Supreme Court in *V.J.* (and on this court in the context of the within appeals) when adjudicating on the matter in issue to consider, in the first instance, whether, by reason of the procedural rule in force at the relevant times, the appellants' EU rights were breached. It is contended that the judgment of the CJEU in *H.N.* is authority for the proposition that there was such breach. Counsel argues that this is the question to be addressed by this court rather than the "even if" basis adopted by the learned O'Donnell J. at para. 48 of his judgment.
75. It is submitted that had the Supreme Court, in *V.J.*, actually adjudicated on the import of para. 57 of the CJEU's ruling in *H.N.* and/or addressed the ground as formulated by Cooke J. in his judgment on the leave application in *V.J.*, it is beyond doubt that the time periods that elapsed before which the *V.J.* applicants could apply for subsidiary protection would have been found to be inordinate by operation of EU law and, as such, in breach of EU law. It is further submitted that, by reason of such breach, the question of the *V.J.*

applicants (or the appellants in the present appeals) having to establish prejudice in order to obtain relief was essentially unnecessary and irrelevant under EU law.

76. The position adopted by the Minister is that the issues raised by the appellants have been comprehensively determined in favour of the State by the Supreme Court in *Nawaz v. Minister for Justice* [2015] IESC 30 and *V.J.* It is contended that paras. 47 to 49 of the judgment in *V.J.* are authority for the position that even if an inordinate delay was established, it did not follow that *certiorari* would be the appropriate remedy as this would not automatically mean that the decision itself was lacking in legality. Counsel further contends that the appellants' argument in relation to inordinate delay is an argument that was not raised in the judicial review proceedings.
77. Insofar as counsel for the Minister argues that "delay" was not raised in the High Court, I am of the view that the Minister adopts too literal an approach to the specific argument canvassed on behalf of the appellants. The "delay", or perhaps more aptly described as the "timing" point is clearly part of the ground in respect of which Cooke J. granted leave in *V.J.* and which constituted part of the grounds upon which the within appellants sought judicial review. As already noted, the Cooke J. ground was rejected by the trial judge at para. 24 of the judgment delivered in *F.M. v. Minister for Justice* [2018] IEHC 274 and rejected in all the other cases the subject of these appeals. Accordingly, I am satisfied that the subject matter of this head of appeal was before the High Court and that the trial judge's treatment of the issue is covered by the grounds of appeal put before this court.
78. The first question for determination is whether there is merit in the argument that in *V.J.*, O'Donnell J. did not specifically address the Cooke J. ground or what is said by counsel for the appellants to be the true import of the CJEU's ruling at para. 57 of its judgment in *H.N.*
79. What the CJEU had to determine in *H.N.* was whether the Qualifications Directive, interpreted in the light of the principle of good administration in the law of the EU, permitted a Member State to provide that an application for subsidiary protection can be considered only if the applicant has applied for and been refused refugee status. As already set out, the CJEU found that the principles of effectiveness and good administration did not preclude the system which operated under the 2006 Regulations "provided that, first, it is possible to submit the application for refugee status and the application for subsidiary protection at the same time and, second, the national procedural rule does not give rise to a consideration in which the application for subsidiary protection is considered only after an unreasonable length of time, which is a matter to be determined by the referring court." (at para. 57)
80. It can fairly be said that the first proviso referred to by the CJEU at para. 57 of its judgment was not expressly provided for under the system which pertained under the 2006 Regulations.
81. While the question of whether *certiorari* and/or declaratory relief should follow *as a matter of law* because the applicants were not afforded the entitlement to apply for

subsidiary protection at the same time as applying for refugee status was not perhaps expressly addressed in *V.J.*, it is nevertheless implicit from his judgment that O'Donnell J. was cognisant of the argument being advanced, as is evident from the fact that at para. 7 thereof he recites the Cooke J. leave ground. In any event, the question of whether a court should grant a remedy solely on the ground of the legal flaw in the bifurcated system that operated under the 2006 Regulations was squarely considered by the Supreme Court in *Nawaz v. Minister for Justice* [2015] IESC 30, a decision referred to in *V.J.* This was the matter which had been the subject of the Supreme Court's preliminary reference to the CJEU in December 2012 and which resulted in the judgment given by the CJEU in *H.N.* on 8 May 2014, as referred to earlier in this judgment.

82. It is, I believe, instructive to set out in some detail how the Supreme Court addressed the enmeshment question in *Nawaz*. Writing for the court, O'Donnell J. stated as follows:

"10 It is apparent therefore that the ECJ answered the question posed by this Court in the negative, but with a proviso. The matter was re-entered before this Court to consider what order should be made to dispose of the appeal in the light of the judgment of the ECJ. Since the core question in the proceedings was an issue of European Union law the only question was the application of the ruling of the ECJ to the facts of the judicial review proceedings. Since the facts were not at issue the decision of the ECJ appeared to resolve the legal issue raised in the proceedings. At one point it seemed possible that the matter might be resolved by agreement between the parties, but such agreement was not possible and the matter was argued before this Court.

11 On behalf of the applicant, it was argued that the Court should proceed to make an order of certiorari quashing the ministerial refusal of the 27th of July 2009 on the grounds that the burden of the decision of the ECJ was that Irish law was not compliant with European Union law because it did not permit for application for refugee status and application for subsidiary protection to be made at the same time....

12 There is no doubt that the bringing of these proceedings and the consequential reference of the question to the ECJ developed the law in a difficult and technical area. Furthermore, it is apparent that Irish law as of July 2009 did not make explicit provision for an application for both refugee status and subsidiary protection to be made at the same time and ad hoc procedures have now been introduced to permit this. However, litigation does not exist simply to clarify legal issues. Instead it exists to allow parties to seek and obtain remedies to which they are entitled as a matter of law. Here the Court must consider what order it should make to resolve the proceedings between the parties. It is implicit in the applicant's approach that he accepts that he cannot obtain the original relief of certiorari of the Minister's refusal, at least on the grounds upon which it was originally sought. Again, it is implicit in the applicant's approach that he contends that it is permissible for the Court to make an order of certiorari and quash the ministerial refusal not on the

grounds sought, but rather on the apparent flaws in the legal regime as identified in the proviso to the determination of the ECJ at paragraph 57 of its decision.

13 The Minister sought to argue initially that to accede to the applicant's claim involved an amendment to the grounds upon which he sought judicial review, which was not permissible at this stage of proceedings. This Court does not accept that this is necessarily the correct analysis of what is argued for here. There is little doubt that if in judicial review proceedings a court considered the Applicant was entitled to succeed and obtain the reliefs sought but not precisely in the terms argued, the court could adjust any declaratory order, or indeed the terms of any order of certiorari, to reflect the court's determination of the true position, and that this would not necessarily require any application to amend the grounds. However, the Court considers that the Applicant faces a number of difficulties with this argument. Even assuming for the moment that it could be said that the legal regime in 2009 was in some way defective in not making provision for an application for both refugee status and subsidiary protection at the same time, the fact remains that the Applicant never made such an argument in the High Court or indeed in this Court inasmuch as the matter was ventilated here. Further, and perhaps more fundamentally, the Applicant could not have made such an argument because factually he was not in a position to do so. Neither he nor his representatives had sought to make a simultaneous application for refugee status and subsidiary protection. To have made such an application would have involved applying (even simultaneously) for refugee status, and the clearest point of the Applicant's argument was that he contended he should not be obliged to apply for that status. The Applicant's objection was not one of timing but rather to being required to make any application for refugee status at all. Finally, it should be said that the assumption which the Applicant makes in advancing this latest argument does not appear to be necessarily correct. It is not at all apparent that the legal regime in 2009 would not have permitted some form of ad hoc simultaneous application if that was what an applicant truly sought. But that argument would in any event require detailed analysis of the procedures available both as a matter of law and fact in 2009. The very fact that those procedures were not the subject of any scrutiny in the course of these proceedings, and that accordingly it is not possible to say definitively whether or not Irish law precluded a simultaneous application, only illustrates the fundamental fact that the matters now relied on were not properly part of the proceedings or the determination of the High Court which is the subject matter of this appeal."

83. Counsel for the appellants accepts that the appellants did not seek to apply for subsidiary protection when applying for refugee status. He submits, however, that it was not incumbent on them to do so as they did not know at that time that they would not be granted refugee status. Moreover, it is contended that the Minister has not put forward evidence that such application would have been entertained. Counsel emphasises that the essence of the appellants' argument is that they had the right to apply for subsidiary protection at the same time as applying for refugee status (as established by the CJEU in

H.N.) but that that right was breached because of the system in place when their subsidiary protection applications were submitted and considered. It is also submitted that the appellants' circumstances can be distinguished from the factual matrix in *Nawaz*.

84. I accept that *Nawaz* is distinguishable from the present cases in the sense that, firstly, the applicant in *Nawaz* never made the argument in the High Court that he had been denied the opportunity to make a subsidiary protection application at the same time as an application for refugee status. Moreover, as observed by O'Donnell J, he could not have done so as he had never applied for refugee status. I also accept that the appellants made the case in the High Court that *certiorari* should lie because the procedural rules in place at the time of their subsidiary protection applications did not provide for the making of an application for subsidiary protection at the same time as an asylum application. However, it remains the case that, as a matter of fact, none of the appellants sought to make a subsidiary protection application when making their respective asylum applications. Counsel submits that there was no requirement to do so, arguing, in reliance on the CJEU's ruling in *H.N.*, that appellants should have been afforded the possibility of so doing and that the absence of such a possibility merits the granting of *certiorari* and/or declaratory relief.

85. As to the proposition advanced by counsel, I believe the relevant starting point for consideration to be the dictum of O'Donnell J. in *Nawaz* where, at para. 12, he stated:

"...it is apparent that Irish law as of July 2009 did not make explicit provision for an application for both refugee status and subsidiary protection to be made at the same time ...However, litigation does not exist simply to clarify legal issues. Instead it exists to allow parties to seek and obtain remedies to which they are entitled as a matter of law. (emphasis added)

86. To my mind, the question is whether the appellants are entitled, as a matter of law, to relief solely on the basis that the system in operation when their subsidiary protection applications were being processed did not admit of the possibility of applying for subsidiary protection at the same time as an application for asylum. Perhaps the question is better understood by asking whether the deficiency in the 2006 Regulations can be said, in respect of these appellants, to strike at the very substance of the EU right in issue. In my view, the question must be answered in the negative. Whatever defect might be said to have attached to the 2006 Regulations, *as a matter of law* the 2006 Regulations provided a mechanism for the enforcement of the right to subsidiary protection. Moreover, it is undisputed that the appellants did in fact apply for subsidiary protection and had their applications considered by the Minister. Indeed, in his oral submissions, counsel accepted that the appellants' right to apply for subsidiary protection was "not totally breached".

87. It must also be emphasised that if dissatisfied with the first instance decision the appellants could avail of an effective remedy (judicial review) which each of the appellants has pursued. Moreover, as already referred to, in these appeals none of the appellants seeks to challenge the Minister's treatment of their individual applications. It

has not been suggested in this court that the Minister's assessment of the appellants' individual circumstances or relevant country of origin information was deficient or otherwise unfair or that the trial judge erred in holding that no infirmity attached to the way the individual applications were decided by the Minister. Each of the cases was subject to a thorough decision by the Minister who took account of the case put forward for subsidiary protection and considered cogent and relevant country of origin material.

88. In my view, it is simply not enough to argue that *certiorari* or declaratory relief should follow solely on the ground that the CJEU clarified certain matters in *H.N.*, without some factual basis having been put forward about how the system actually in operation when the appellants' subsidiary protection applications were processed in fact breached the substantive protections provided for in the Qualifications Directive.
89. Undoubtedly, as far as the appellants are concerned, it took a period of time before their subsidiary protection applications were decided from when they were first made. The relevant timeframe for the purposes of the present considerations is the time taken to adjudicate on the subsidiary protection applications, having regard to the *dictum* of the CJEU in *H.N.* that the State was not precluded from deciding the subsidiary protection application after the application for refugee status has been refused.
90. In the case of F.M., refusal of refugee status was communicated in June 2010. His application for subsidiary protection was made in July 2010 and refused nine months later in April 2011. In the case of I.M., the timeframe between refusal of refugee status (March 2009) and refusal of subsidiary protection (November 2012) was three years and 8 months approximately. The timeframe for P.C.N. was some two and a half years between the decision on refugee status (January 2009) and his subsidiary protection decision (July 2011). In the case of J.N., there was a similar two-and-a-half-year gap between the refusal of refugee status (January 2009) and the refusal of subsidiary protection (July 2011). In the case of S.S., he was refused refugee status in February 2011 and his subsidiary protection application was refused some five months later in July 2011. With regard to J.U., a year and ten months elapsed between the refusal of refugee status (October 2009) and the adverse decision on his subsidiary protection application (August 2011). In T.O.'s case, the relevant timeframe was ten months. R.B.'s circumstances were that refusal of refugee status issued at end of May 2011 and subsidiary protection was refused twelve months later (11 May 2012). The relevant timeframe as regards H.Y.O. and D.F.O.I. is two years from the adverse refugee status decision (July 2010) until the Minister's refusal of subsidiary protection (July 2012). In the case of D.D., some three years and nine months elapsed between the refusal of refugee status (March 2009) and the subsidiary protection refusal (December 2012).
91. In the lower court, none of the appellants advanced evidence of prejudice as a result of their not being able to apply for subsidiary protection until their refugee applications were determined. Similarly, in this court, the appellants have not said how any delay (as regards their individual circumstances) impacted on the effectiveness of the subsidiary protection procedure as provided for in the Qualifications Directive. They have not

advanced any evidence of how the fact that the procedural rules did not allow for the making a claim for subsidiary protection when they were making their asylum claims diminished the effectiveness of the protections afforded by the Qualifications Directive.

92. The appellants' counsel sought to counteract this evidential lacuna by contending that if such evidence had been before the trial court, it could not have been dealt with in any event because of the limitations of judicial review as a remedy. I am not at all convinced by counsel's submission, given what the courts in this jurisdiction have said about the parameters of judicial review as a remedy. Moreover, to my mind, even if the procedural rules in place at the time had allowed for the making of an application for subsidiary protection at the same time as making an asylum claim, the fact remains that under EU law, as clarified by the CJEU in *H.N.*, it was permissible for the asylum applications to be determined first. That, invariably, would have resulted in the Minister then commencing to adjudicate on the subsidiary protection applications. It will be noted in the present cases that, almost without exception, applications for subsidiary protection followed within days or weeks of the adverse refugee status decisions. But, these observations aside, in my view there is a more fundamental flaw in counsel's argument which arises from the ruling of the CJEU in *H.N.* It will be recalled that the CJEU found no infirmity in the procedure whereby asylum claims would be determined ahead of subsidiary protection applications provided, inter alia, that that procedural rule "*does not give rise to a situation in which the application for subsidiary protection is considered only after an unreasonable length of time, which is a matter to be determined by the referring court.*" (emphasis added)
93. As I have said, as far as the present cases are concerned, it has not been suggested by counsel that evidence of prejudice accruing to the appellants, or any one of them, by reason of the timeframes involved in the individual cases was before the lower court, or that the trial judge failed to address such claims or otherwise erred in his assessment of such claims. In the absence of a prejudice argument having been argued in the lower court, it is not for this court to speculate (as counsel effectively invited this court to do by reference to F.M.'s circumstances) as to what might have occurred with regard to the appellants' subsidiary protection applications had they been able to make a claim for subsidiary protection in tandem with their asylum claims.
94. Bearing the foregoing factors in mind, in my judgment, it cannot be said, insofar as the appellants' cases are concerned, that "*the principle of effectiveness*", as referred to at para. 57 of the judgment of the CJEU in *H.N.*, has been so undermined by the failure to afford an opportunity to apply for subsidiary protection at the same time as when applying for asylum such that this court should find that the trial judge erred in not granting relief.
95. Accordingly, I am not satisfied that the lack of a parallel subsidiary protection application process when the appellants were applying for refugee status struck at the substance of the appellants' rights as guaranteed by the Qualifications Directive, to paraphrase Hogan

J. at para. 55 of *N.M.* In all the circumstances, I perceive no error in the trial judge's dismissal of the Cooke J. ground.

96. It was contended by counsel for the appellants that if the court considers *V.J.* (and, presumably, *Nawaz*) binding, or that that jurisprudence should be followed under *stare decisis* rules, then regard must be had to relevant jurisprudence from the CJEU which, by definition, ranks superior, in accordance with the principle of the supremacy of EU law. The supremacy of EU law has been well rehearsed in *Costa v. E.N.E.L. (Case C-6/64)* EU: C: 1964: 66 [1964] E.C.R. 585 and *Amministrazione delle Finanze dello Stato v. Simmenthal SPA (Case 106/ 77)* EU: C: 1978:49, [1978] E.L.R. 629. The question is whether this principle has any particular bearing on the approach this court has thus far adopted with regard to the enmeshment issue.
97. By way of relevant EU jurisprudence, counsel relies on *Commission v. Federal Republic of Germany (Case C-137/14)* EU:C:2015:683, [2015] All E.R. (D) 161 (Oct).
98. That matter came before the CJEU further to, *inter alia*, a complaint by the Commission that certain provisions of the German planning code, which restricted annulment of administrative decisions covered by Directive 2011/92/EU of 13 December 2011, O.J. L26/1, 28.1.2012 (on the assessment of the effects of certain public and private projects on the environment) and Directive 2010/75/EU of 24 November 2010, O.J. L334/17, 17.12.2010 (on industrial emissions) to only those cases where an infringement of an individual's public law right had been established, were contrary to the obligations imposed by the relevant Directives.
99. At paras. 40-41 of its judgment, the CJEU distilled the issue for consideration, in the following terms:
- "40 By the second part of its complaint, the Commission submits that, in accordance with Paragraph 46 of the VwVfG, a challenge by an individual to the legality, on the ground of a procedural defect, of an administrative decision concerning an environmental impact assessment cannot lead to the annulment of that decision unless it is possible that the decision would have been different without the procedural defect alleged and unless, at the same time, a substantive legal position to which the applicant was entitled has been affected. Accordingly, it is for the applicant to establish, firstly, that causal link and, secondly, the effect of that defect on his rights.*
- 41 The Commission argues that Article 11 of Directive 2011/92 does not allow the burden of proving such a causal link to be placed on the applicant."*
100. At para. 56, the CJEU found that the requirement of establishing a causal link between a procedural defect and the outcome of the administrative decision in issue "makes it excessively difficult to exercise the right to bring proceedings provided for in Article 11 of Directive 2011/92 and undermines the objective of that directive which seeks to provide 'members of the public concerned' with a broad access to justice."

101. It thus held, at para. 57: -

"To refuse annulment of an administrative decision adopted in breach of a procedural rule on the sole ground that the applicant is unable to establish the effect that the defect has on the merits of that decision renders that provision of EU law totally ineffective."

102. The CJEU opined, at para. 59, that shifting the burden of establishing causality onto the person bringing the action was capable of **"making the exercise of the rights conferred on that person by Directive 2011/92 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments...** (emphasis added). It went on to state, at para.60:

"It follows therefrom that the impairment of a right, for the purposes of Article 11 of Directive 2011/92 cannot be excluded unless the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof of causality fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant..."

103. On the basis of the CJEU's pronouncements in *Commission v. Germany*, counsel for the appellants argues that it is unlawful under EU law for a court to refuse annulment, or to refuse to quash a decision such as those impugned in the within proceedings, unless the court *"is in a position to take the view, without in any way making the burden of proof of causality fall on the applicant"* that the decision, absent the procedural defect, would have been no different.

104. Counsel argues that the opposite approach was adopted in *V.J.* by the holding that it was necessary for the subsidiary protection applicants to show that they were prejudiced by reason of the system in place at the relevant times which did not allow for the making of a subsidiary protection application as the same time as an application for refugee status.

105. In reliance on what was set out by at para. 57 in *Commission v. Germany*, it is urged that relief by way of *certiorari* or declaratory order should be granted, particularly in the context where, given the restraints of judicial review as a remedy, neither the High Court (nor this court on appeal) can embark upon an examination of whether or not the outcome of the substantive subsidiary protection decisions would have been different had the appellants been afforded the facility to apply for subsidiary protection when applying for refugee status.

106. Counsel queries as to how the trial judge (or this court on appeal) could, without an enquiry into the *de facto* situation at the time, be satisfied that absent the procedural defect the appellants' situation would have been no different when, under EU law, the

appellants should have been afforded the opportunity to apply for subsidiary protection when applying for asylum. It is submitted that as such an examination cannot be embarked on by this court (and could not have been embarked on by the trial judge) given that it would have involved assessment of a factual matrix which was not part of the subsidiary protection decisions made by the Minister. It is argued that such assessment would be outside the parameters of judicial review. Counsel submits, however, that the limitations which attach to judicial review as a remedy should not deprive the appellants from obtaining relief for the breach that occurred in their respective cases.

107. I have earlier addressed what are said to be the frailties attaching to judicial review as a remedy and have found that not to be the case. But that is not the salient conclusion in these cases. To my mind, counsel's reliance on *Commission v. Germany* is predicated on this court accepting that the effectiveness of the appellants' rights, as provided for in the Qualifications Directive, has been rendered nugatory by dint of the procedural rules under which their subsidiary applications were made. However, for the reasons set out earlier in this judgment, I have found no merit in the argument that the effectiveness of the rights provided for in the Qualifications Directive has been undermined by the system in place when the appellants' subsidiary protection applications were determined.
108. To reiterate, the essential question is whether the process under which the appellants were obliged to pursue their subsidiary protection applications rendered the right to apply for subsidiary protection, as provided for in the Qualifications Directive, totally ineffective in the sense which effectiveness was considered by the CJEU in *Commission v. Germany* (albeit in an entirely different context). It is accepted by counsel that the decision of the CJEU in *Commission v. Germany* is not on all fours with the appellants' situation, but it is nevertheless argued that the principle enunciated by the CJEU is of wider application than the specific circumstances which prevailed in that case.
109. I find no basis upon which the appellants can call in aid *Commission v. Germany*. The pronouncements of the CJEU are clearly directed to what the CJEU was presented with in that case. This is clear from the tenor of the judgment overall and, in particular, para. 57. The CJEU's pronouncements were directed at a situation whereby the legislative provisions in issue in the case had rendered the rights and processes provided for in the relevant directives entirely ineffective. Whatever their deficiencies, that cannot be said of the 2006 Regulations given that thereunder the appellants were provided with and availed of the right to apply for subsidiary protection although, admittedly, not contemporaneously with their asylum applications. There is no evidence that the procedural rules put in place by the 2006 Regulations made the appellants' exercise of their right to avail of subsidiary protection "excessively difficult" in the sense considered by the CJEU in *Commission v. Germany*.
110. In all the circumstances, I find that the trial judge did not err in law or in fact in refusing to grant relief on the enmeshment ground.

Is there necessity for a reference to the CJEU?

111. In their respective Notices of Appeal, the appellants request that a reference be made to the CJEU on the basis that there is uncertainty as to whether judicial review constitutes an effective remedy for the purposes of Article 47 of the EU Charter or “the general principles of European Union law”. They also request a reference in order for the CJEU to determine whether “*confining the right to apply for subsidiary protection to the circumstance in which the asylum seeker’s entitlement to remain lawfully in the State pursuant to s.9(2) of the Refugee Act 1996, has expired and a decision has been taken to propose the deportation of the applicant under s.3(3) of the Immigration Act 1999, Regulation 4(1) of the 2006 Regulations in conjunction with s.3 of the said Act of 1999, have the effect of imposing a precondition or disadvantage upon a subsidiary protection applicant which is ultra vires Council Directive 2004/83/EC of the 29th April, 2004, and/or incompatible with general principles of European Union law?*” (the enmeshment issue).
112. Having regard to the extensive jurisprudence at both EU and national level that judicial review constitutes an effective remedy for the purposes of Article 47, I perceive no basis upon which this court should seek a reference on the issue. Similarly, as far as the enmeshment issue is concerned, I am of the view that the suggested question to be referred has effectively been addressed by the CJEU in *H.N.*, and by the Supreme Court in *Nawaz* and (indirectly) *V.J.* I agree with the Minister’s submission that there is no legal issue identified as not *acte clair* which requires to be determined by the CJEU.
113. For all of the reasons set out herein I would dismiss the appeals.