O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.

[S:AP:IE:2017:000174]

[S:AP:IE:2018:000088]

BETWEEN

V.J.

APPLICANT/RESPONDENT

AND

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

RESPONDENTS/APPELLANTS

[S:AP:IE:2017:000175]

[S:AP:IE:2018:000089]

BETWEEN

M.L.

APPLICANT/RESPONDENT

AND

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

RESPONDENTS/APPELLANTS

[S:AP:IE:2017:000176]

[S:AP:IE:2018:000087]

BETWEEN

J.C.M.

APPLICANT/RESPONDENT

AND

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

RESPONDENTS/APPELLANTS

[S:LE:IE:2012:000505]

BETWEEN

M.L.

APPLICANT/APPELLANT

AND

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

RESPONDENTS

[S:LE:IE:2012:000506]

BETWEEN

J.C.M.

APPLICANT/APPELLANT

AND

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

RESPONDENTS

Judgment of O'Donnell J. delivered the 31st day of October 2019.

Introduction

1 These cases have a very complex procedural history and raise a number of points about the regime for decisions on applications for subsidiary protection which applied in Ireland between 2006 and 2013, and which has given rise to much litigation and criticism both in the Irish courts and in the Court of Justice of the European Union ("CJEU"). During that period, Ireland operated what has been described accurately as bifurcated system. That meant that, notwithstanding the obvious similarities between the criteria for a grant of asylum and those for subsidiary protection, applicants for asylum were first dealt with under a statutory scheme which established the Office of the Refugee Applications Commissioner ("ORAC"), and an appeal to the Refugee Appeals Tribunal ("RAT") resulting in a formal decision of the minister to grant or refuse asylum. Under the provisions of S.I. No. 518/2006 - European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations"), subsidiary protection was designed to be granted to a person whose application for asylum had been refused, and accordingly it was only at that point that an application for subsidiary protection might be made. Such an application was made to the Minister, and in practice considered by his or her departmental officials. Like the decisions of both the ORAC and the RAT, the Minister's decision was subject to judicial review. The complexity of these procedures provided fertile ground for legal challenges, and since the relevant law implemented the law of the European Union, such challenges could and did lead to a number of references to the CJEU.

2 It is a feature of the law relating to immigration that legal challenges by way of judicial review tend to be generic. The challenge to the validity of the decision often concerns a point of law which may be of general application. Accordingly, if leave is granted for judicial review, the consequence may be that a raft of subsequent identical challenges raising the same point are raised in other cases, which often has the effect of creating significant blockages in the asylum and subsidiary protection processes and in the courts. Since, however, the individual applicants are often represented by different lawyers, the process is an organic one. Not all the points that are raised are developed in the same proceedings, or in the same way. Where the matters come before the High Court, substantial efforts are made to attempt to isolate and determine points which govern a significant number of cases, but the appeals in these cases are a cautionary tale in the difficulty in managing such disputes and bringing them to a clear conclusion.

3 In order to understand the issues which remain for resolution in these appeals, it is necessary to trace the course of three separate streams of litigation on issues relating to

subsidiary protection, only two of which are, however, directly involved in these proceedings.

V.J.

4 In the first case, V.J. arrived in the State from Moldova on 18 October 2008. He sought asylum in Ireland based on a fear of persecution in Moldova for reasons of political opinion or activity. The persecution alleged involved threats of harm to himself and his family after his wife, a member of an opposition party in Moldova, attempted to publish an article implicating the son of the country's president in illegal cross-border trade in drugs and alcohol. His wife had arrived in Ireland in 2006, and they have one child together here. His other children were in Moldova.

5 V.J.'s application for refugee status under s. 17 of the Refugee Act 1996 (as amended) ("the 1996 Act") was refused by letter dated 24 September 2009, for lack of credibility following on an adverse decision of the RAT. The letter from the Minister informing V.J. of the refusal of his application for refugee status was in standard terms, and offered the applicant the opportunity of leaving the State voluntarily or consenting to a deportation order, and informed him of his 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) ("the 1999 Act").

6 V.J. duly applied for subsidiary protection under the then applicable 2006 Regulations, and, in the alternative, for permission to remain in the State temporarily, by an application dated 15 October 2009. He was notified that the Minister had, however, determined that he was not a person eligible for subsidiary protection by letter dated 5 April 2012, on the basis that his claim was not credible, and having regard to relevant country of origin information. He was accordingly notified on 10 May 2012 that the Minister had decided to make a deportation order in respect of him under s. 3 of the 1999 Act, requiring him to leave the State on 27 May 2012.

7 On 31 July 2012, the High Court (Cooke J.) (see [2012] IEHC 337) granted V.J. leave to seek judicial review of the decision refusing him subsidiary protection. The sole ground was formulated by the judge as follows:-

> "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 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, 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."

8 This point has been referred to colloquially as the "enmeshment point", and to avoid additional confusion I will so refer to it in these proceedings.

M.L. and J.C.M.

9 Both M.L. and J.C.M. were asylum seekers who arrived in Ireland from the Democratic Republic of the Congo ("the DRC"). M.L. arrived the on 24 September 2008. He sought asylum in Ireland based on his fear of persecution should he returned to his country of origin, arising out of the death of the wife of an army colonel in the health centre where he worked. He alleges that he and his sister, a nurse at the centre, were arrested and detained pending trial in a military court, during which time he was forced to watch his sister being raped by guards. It is alleged that he and his sister are from Bas Congo and of a minority Mundibu ethnicity, whereas the country is controlled by persons of Swahili ethnicity.

10 M.L.'s application for refugee status was refused by letter dated 10 January 2011, again on the basis that his claim was not credible. He applied for subsidiary protection on 21 January 2011, but was notified that the Minister had determined that he was not a person eligible for subsidiary protection by a decision letter dated 25 July 2011. On 10 August 2011 his application for leave to remain was considered, and on the same day it was determined that a deportation order should be made in respect of him. The deportation order was signed on 11 August 2011, and notified to the applicant on 18 August 2011.

11 J.C.M. also arrived in the State from the DRC, in his case on 6 February 2009. His application for asylum was based on his claim to have been a member of the *Armée de la victoire*/Save the Congo religious movement established by Ferdinand Kutino, and worked as a driver for Mr. Kutino's wife. He claims that he was arrested by the authorities at a protest and detained without charge for a number of months, during which time he was threatened and beaten. He further claims he was released on agreement that he would poison Mr. Kutino's wife, but was unable to do so, and thus fled the DRC in fear of his life.

12 J.C.M.'s application for asylum was refused on grounds of lack of credibility, and was consequently refused by the Minister on 22 September 2010. He applied for subsidiary protection and leave to remain under s. 3 of the 1999 Act on 6 December 2010. His application was duly refused by letter dated 25 July 2011.

13 Although the cases were factually unconnected, the applications for leave to seek judicial review in M.L. and J.C.M. were heard together, primarily because the applicants were represented by the same legal team, and had filed identical legal submissions.

14 On 12 October 2012, the High Court (Clark J.) (see [2012] IEHC 485) granted the applicants in both cases leave to seek judicial review of their subsidiary protection decisions on the following grounds:-

> "The procedures applied by the Minister with regard to subsidiary protection are unfair and in breach of natural and constitutional justice, and ultra vires Council Directive 2004/83/EC and in breach of general principles of the law of the Union, in that:

(1) The applicant is told of his right to apply for subsidiary protection after being told that his right to remain in the State has expired;

(2) The applicant potentially carries findings of a lack of credibility with him from the asylum process thereby creating a negative impression from the outset;

(3) The applicant cannot bring a claim unless he has been informed by the Minister that he is a failed asylum seeker. The decision to refuse a declaration of refugee status implies that the Minister has already given some consideration to the case and has made a negative determination in relation to the applicant's case. This creates an impression of partiality on the part of the Minister whose officials will also consider the subsidiary protection application;

(4) An application for subsidiary protection is considered during the pre-deportation process, when the Minister has already formed an intention to consider making a deportation order;

(5) The competence, knowledge and training of the civil servant assessing eligibility for the subsidiary protection, a complex legal issue, is not regulated; and

(6) In contrast with asylum applications, subsidiary protection applications are not considered by a person who is independent of the Minister in the performance of his functions."

At this point, it is necessary to note that, although Clark J. granted leave on these grounds and the case proceeded to hearing upon them, she also refused to grant leave on certain other grounds advanced by the applicants. The refusal of leave was then appealed to the then Supreme Court (Supreme Court Record Nos. 505 and 506/2012). Those appeals were pending at the date of establishment of the Court of Appeal, and were initially transferred to the Court of Appeal pursuant to Article 64 of the Constitution. When appeals in the cases of V.J. and M.L. and J.C.M. were brought to this court, the Article 64 direction was cancelled, and these appeals returned to the Supreme Court. It will be necessary to deal with them in due course. For present purposes, they can be identified as "the Article 64 appeals", that is, the appeals against the refusal by the High Court of leave to seek judicial review in the M.L. and J.C.M. cases on certain identified points.

15 The V.J., M.L. and J.C.M. cases together raised a number of related issues in respect of the procedure for subsidiary protection applications. They were accordingly directed to be heard together, and were listed for hearing before McDermott J. It might have been anticipated, therefore, that the resolution of this case (and any appeal) would have determined the major issues concerning the subsidiary protection regime. However, the course of these proceedings was significantly affected, and deflected, by a third stream of litigation, which followed a complex and unpredictable course.

The proceedings in the M.M. case

16 In *M.M. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 547, (Unreported, High Court, Hogan J., 18 May 2011), the applicant was a Rwandan refugee of Tutsi ethnicity who sought asylum in Ireland on the basis that, if returned to his home state, he was at risk of being prosecuted before a military court for openly criticising the manner in which investigations into the Rwandan genocide in 1994 were being carried out. Once again, this application for refugee status was refused for lack of credibility. The applicant sought judicial review of the Minister's decision to refuse to grant him subsidiary protection on the basis that the manner in which his application was dealt with contravened Article 4(1) of Directive 2004/83/EC ("the Qualification Directive"). Article 4(1) provided:-

> "Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application."

17 The applicant argued that the reference to cooperation with the applicant and the duty of the Member State meant that the authorities were under a duty to communicate with the applicant during the course of the assessment of his application. In particular, it was argued that in the event of a proposed adverse decision, that duty meant that the authorities were obliged to supply a draft decision in advance to such applicant for his or her comments.

18 Hogan J. reluctantly came to the conclusion that the position in European Union law was not clear, and therefore referred the following question to the CJEU in accordance with Article 267 TFEU:-

> "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?"

The court granted an interlocutory injunction restraining the deportation of the applicant pending the outcome of the reference to the CJEU.

19 In a judgment delivered on 22 November 2012, the CJEU answered the question referred to by Hogan J. in the negative (see *M.M. v. Minister for Justice, Equality and Law Reform* (Case C-277/11) EU:C:2012:744). However, the terms of the decision of the CJEU gave rise to considerable additional debate. At para. 95 of its judgment, the CJEU decided:-

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

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

– 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."

20 In retrospect, it might be said that the second paragraph of this decision was intended as a helpful clarification that in the bifurcated system, the second decision cannot be a formality, and there must be a real opportunity for the applicant to make known his or her views. The reference, however, to the "right to be heard" created an ambiguity which gave rise to further contention, confusion and delay.

21 When the case in M.M. returned to the Irish High Court, it was clear that the applicant could not succeed on the ground raised and which had been referred by Hogan J.: see *M.M. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 9, [2013] 1 I.R. 370. However, there was considerable debate as to the impact of the second paragraph of the decision of the CJEU. Ultimately, Hogan J. came to the conclusion that in the light of the judgment of the CJEU, it was necessary to quash the decision of the Minister, because the decision implied that the Minister had to make a separate and independent adjudication of the applicant's claims with the possibility of an oral hearing and determination. The court's decision can be paraphrased as follows:-

(1) The Minister was not required to provide the applicant with a draft decision on subsidiary protection for comment prior to its adoption.

(2) An oral hearing would not routinely be required in an application for subsidiary protection, although there may be circumstances in which an oral hearing would be necessary (for example, where an adverse credibility finding was to be made which was separate and distinct from such a finding made during the asylum process).

(3) In a bifurcated asylum and subsidiary protection system, the Minister could not decide the subsidiary protection issue by relying on the reasoning of the asylum decision, where such reliance precluded the applicant from re-opening certain issues.

(4) The Minister's decision to refuse subsidiary protection in this case relied completely on the adverse credibility findings made in the asylum application, and where the Minister made no separate and independent adjudication on the applicant's claims, the applicant had not been afforded a fair hearing of his subsidiary protection claim.

(5) In order for a subsidiary protection hearing to be effective, it would require a procedure whereby (i) the applicant was invited to comment on any adverse credibility findings in the asylum application, (ii) the applicant was given a fresh opportunity to revisit all matters bearing on the claim for subsidiary protection, and (iii) the applicant was afforded a complete, fresh assessment of his credibility.

22 At this point, it is necessary to observe that these cases were ongoing at the time that the reference in *M.M.* was underway, and were adjourned pending the outcome of that reference. Furthermore, when the matter was recommenced before McDermott J. in the High Court, although the CJEU had delivered its judgment on the second reference which will be described shortly, the decision of Hogan J. represented the up-to-date position in Irish law, and had a significant influence on the outcome of this case in the High Court. Before, however, dealing with the decision in this case, and the impact of the *M.M.* reference upon it, it is necessary to fast-forward the narrative in relation to *M.M.* and complete the account of that tortuous case.

The *M.M.* appeal

23 The decision of Hogan J. in respect of the additional qualifying paragraph of the decision of the CJEU on the first reference could be seen as an orthodox application of national law principles, once it was determined, as it appeared to be, that the subsidiary application process should be treated as a procedure entirely separate from the asylum procedure which had preceded it, with a right to be heard. In Irish law, there is a strong tradition of fair procedures requiring oral hearings and, if necessary, representation and cross-examination before certain decisions are made. However, the question of the extent of the right to be heard in a subsidiary protection application subsequent to a refusal of an asylum application is one of European Union law. Accordingly, the decision of Hogan J. was appealed to the Supreme Court. The Supreme Court in turn considered that it was not clear what was contemplated by the right to be heard in the specific circumstances identified in the CJEU decision, and accordingly referred the following question to the CJEU for a preliminary ruling:-

> "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?"

24 In a judgment dated 9 February 2017 (see M.*M. v. Minister for Justice and Equality* (Case C-560/14) [2017] 3 C.M.L.R. 2), the CJEU gave the following answer to the question referred by the Supreme Court:-

> "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."

25 The import of this decision was significant. As these cases illustrate, nearly all subsidiary protection applications are made on the basis of, and by repeating, the matters set out and advanced in the asylum application. It was rare for applicants to seek to make a different or more elaborate case. It was normal for the subsidiary protection decision to be made on the written materials, without an interview, and still less a cross-examination. The import of the first decision of the CJEU in *M.M.*, as interpreted by the Irish High Court, suggested that standard process was presumptively invalid. By contrast, the outcome of the second reference suggested that such a process was presumptively valid, absent specific circumstances relating to the elements available to the competent authority, or the personal or general circumstances in which the application was made. In due course, the Supreme Court allowed the Minister's appeal, and set aside the order of certiorari granted by the High Court: see *M.M. v Minister for Justice and Equality* [2018] IESC 10, [2018] 1 I.L.R.M. 361. The court held that in the bifurcated system which existed in Ireland at the time of the decision on M.M.'s application for subsidiary protection, 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 requirement had been adhered to in M.M.'s case. Exceptionally, it may be necessary to permit an oral interview, but such an exceptional situation did not arise in M.M.'s case: the application for subsidiary protection identified only those matters which had already been relied on in the claim for asylum. The decision of the CJEU made it clear that it was permissible to have regard to the information obtained in the asylum process, and to the assessment of the decision-maker in that process. There was no basis for contending for an oral hearing, still less for an adversarial hearing.

26 It is necessary now to return to the High Court decision in this case, keeping in mind that, at the time, the court had available to it the decision of Hogan J. applying the first reference in *M.M.*, and the decision of the CJEU in the second *M.M.* reference.

The hearing before McDermott J.

27 In the immediate aftermath of the decision of the High Court in *M.M. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 9, [2013] 1 I.R. 370, the parties to this appeal sought to amend their application to add the following ground:-

> "The failure of the respondent to provide an oral hearing to the applicant for subsidiary protection in circumstances where such a hearing is available to an applicant for asylum is in breach of the fundamental principles of EU law and ultra vires Directive 2004/83/EU."

28 In the event, McDermott J. delivered a comprehensive judgment in which he dismissed the applicants' cases in respect of the enmeshment ground on which leave had been granted by Cooke J. in *V.J.,* and dismissed five of the six sub-categories of the fair procedures grounds upon which leave had been granted by Clarke J. in the *M.L.* and *J.C.M.* cases. However, in relation to the ground concerning the entitlement to an oral hearing which had been added in the course of the proceedings, McDermott J. granted an order for *certiorari* in all three cases. In doing so, he concluded that the judgments of the CJEU in the first and second *M.M.* references meant that:-

(i) It was necessary that applicants for subsidiary protection be given an opportunity to address the adverse credibility findings in their subsidiary protection decisions which were quoted directly from the Refugee Applications Tribunal's decision, and a fresh opportunity to revisit the matters bearing on their claims for subsidiary protection, having regard to the requirement that there be a separate and independent adjudication on each claim.

(ii) It was not necessary that an oral hearing must be conducted in all cases permitting the calling of witnesses or cross-examination of witnesses by applicants or their legal representatives. However, it may be that circumstances will arise in which the Minister should consider conducting such a hearing.

(iii) Nonetheless, applicants should be invited to comment upon adverse findings made by the Refugee Appeals Tribunal. If such findings were to be relied upon to the extent evident in the subsidiary protection decisions in V.J., M.L. and J.C.M., consideration should be given to whether this gave rise to "specific circumstances" that would render an interview or hearing with the applicants necessary in order to ensure that their rights to be heard were effectively observed.

(iv) The Minister should at least consider whether an interview and in some cases an oral hearing ought to be afforded to an applicant when the materials include an adverse finding on credibility by the Refugee Appeals Tribunal which is central to

the decision to be made on the subsidiary protection application and contested by the applicant.

29 In that regard, McDermott J. granted certiorari on the additional ground, and also on ground two on which leave had been granted by Clark J. in *J.C.M*. and *M.L*., that is, that the potential carrying of a finding of lack of credibility from the asylum process created a negative impression from the outset. It is apparent, however, from the reasoning in the High Court judgment, that this aspect was found to follow from the conclusions of the High Court in respect of the added ground, being itself one derived from the decisions in *M.M.*

30 The Minister lodged appeals to the Court of Appeal in respect of the decision of McDermott J. In addition, the Minister contested the decision to permit amendment of the statement of grounds to include the additional ground, and further argued that, in any event, the applicants were not entitled to succeed on the additional ground as formulated. Thereafter, this court delivered its decision in *M.M. v. Minister for Justice and Equality* [2018] IESC 10, [2018] 1 I.L.R.M. 361. That decision clearly had a significant impact on the appeals in this case. Accordingly, the Minister sought permission to appeal directly to this court by way of leapfrog appeal in order to clarify and resolve any outstanding issues. For their part, the applicants, recognising that the decision of the Supreme Court in *M.M.* undoubtedly strengthened the Minister's appeal, indicated that they wished to cross-appeal and advance additional grounds on which the decision of McDermott J. should be sustained, namely the grounds which McDermott J. had dismissed. These were the enmeshment ground upon which leave had been granted by Cook J. in *V.J.* and the grounds upon which leave was granted by Clark J. in *M.L.* and *J.C.M.* By determinations of this court dated 15 May 2018 (see [2018] IESCDET 68, [2018] IESCDET 69, and [2018] IESCDET 70) this court granted leave to the Minister to appeal directly to this court in order to resolve all outstanding issues in respect of the subsidiary protection regime which had been applicable at least up until the introduction of S.I. No. 426/2013 - European Union (Subsidiary Protection) Regulations 2013, and ultimately the International Protection Act 2015. This was on the basis that the applicants would be entitled to argue the additional bases upon which they contended that the decision of McDermott J. could be upheld. The court also directed that the Article 64 direction be cancelled so that the appeals from the refusal of leave by Clark J. should also be listed, and that the cases should be case managed together.

Developments in case management

31 It is clear that these appeals raised issues of considerable complexity, as much from a procedural as a substantive point of view. However, the parties adopted a realistic and sensible position at case management that simplified the case at least to some extent. First, the applicant in *V.J.* accepted that his case was indistinguishable from *M.M*. and that in the light of the judgment of the court, the Minister's appeal against that portion of the judgment of McDermott J. must be allowed. This meant that the only question still live in *V.J.* was whether the applicant was entitled to succeed on the enmeshment point. In relation to the oral hearing point in M.L. and J.C.M., there remained a question as to

whether those cases could be distinguished on its facts so that they would fall into one of the specific categories where an interview or oral hearing was required.

32 In relation to the points raised in *M.L.* and *J.C.M.* on which leave had been granted by Clarke J., but which had failed before McDermott J., the applicants were also prepared to refine those points somewhat. Thus, they did not seek to pursue points 5 and 6 (the experience and training of the civil servants involved, and the independence of the deciding body). Nevertheless, they maintained that McDermott J. had been correct to find for the applicant on ground 2 (this was consistent with their position on the oral hearing point), and they further maintained that they ought to have succeeded on grounds 1, 3, and 4 also. Accordingly, the effect of this is that in addition to the *M.M.* point, the points which remained for determination in the *M.L*. and *J.C.M*. cases were based on the contention that the procedures applied by the Minister with regard to subsidiary protection were in breach of natural and constitutional justice, and were *ultra vires* and in breach of Directive 2004/83/EC and in breach of general principles of European Union law in that:-

(i) The applicant is told of his right to apply for subsidiary protection after being told that his right to remain in the State has expired;

(ii) The applicant potentially carries findings of a lack of credibility with him from the asylum process, thereby creating a negative impression from the outset;

(iii) The applicant cannot bring a claim unless he has been informed by the Minister that he is a failed asylum-seeker. The decision to refuse a declaration of refugee status implies that the Minister has already given some consideration to the case and has made a negative determination in relation to the applicant's case. This creates an impression of partiality on the part of the Minister whose officials will also consider the subsidiary protection application;

(iv) An application for subsidiary protection is considered during the pre-deportation process, when the Minister has already formed an intention to consider making a deportation order.

33 While expressed in different ways, these contentions can be seen as elaborations on, or developments closely related to, the enmeshment point at issue in *V.J.*

The Article 64 Appeals

34 In form, these appeals are appeals against the refusal of an application for leave to seek judicial review. Since at the relevant time applications for subsidiary protection did not fall under the procedure specified in s. 5 of the Illegal Immigrants (Trafficking) Act 2000, such an application was made *ex parte* and did not involve any elevated threshold such as a requirement that substantial grounds be established. The normal judicial review test established in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374 applied: it would be sufficient to establish arguable grounds to be granted leave to seek judicial review.

35 It was plain that these matters should be dealt with at the same time as the appeals to this court in respect of the decision of McDermott J. in the High Court. However, these appeals added a further layer of procedural complexity to the case. It was conceivable, if the appeals were dealt with as they stood, that if they succeeded and leave was granted on some or more of the grounds, then the case would have to return to the High Court and proceed as a normal judicial review, with perhaps the inevitability of an appeal to the Court of Appeal and the possibility, indeed, of appeal to this court. It should be recalled that these cases dated back to decisions made in late 2011 and 2012. On the other hand, if the applicants succeeded on some of the grounds on which they sought to uphold the decision of McDermott J., then a determination of these points would be fruitless, but they would remain as potential grounds of challenge which might have to be dealt with in a separate litigation, where perhaps the other grounds were not available.

36 The parties were prepared to agree that if the Supreme Court considered it was possible to do so, the court could hear argument from both parties on the substantive merits, and could make a final order in the case, either of *certiorari* if the argument succeeded, or an order dismissing the claim if it was determined that the points advanced were without merit.

37 The position taken by the parties in this respect was sensible and realistic. As already observed, the actual decisions were made almost ten years ago in a process which was, moreover, intended to operate speedily and to bring certainty to the position of asylum seekers. In addition to the strong public, and, it might be said, private interest in the finality of litigation, there was also the fact that it is desirable that these points should be resolved by the same court which heard and determined the other points raised in these cases. In retrospect, it seems clear that the parties should not have permitted the High Court hearing before McDermott J. to proceed without a resolution of the question of whether or not leave should have been granted on these points. An application for expedition to either the Supreme Court or the Court of Appeal should have been made to ensure that any determination made by the High Court would be comprehensive. It seems likely that these points were thought at the time to be of little significance in comparison to the more extensive issues on which leave was granted, but in the event, the failure to have them finally determined and either rejected or permitted to be included in the challenge then ongoing has created an additional level of procedural complexity and the possibility that these proceedings, already of some antiquity, would continue well into their second decade.

38 The consent and cooperation of the parties is certainly a welcome feature which is very helpful, but it is equally necessary to consider whether it is possible, as a matter of law, to take the course that common sense so clearly suggests. This court (and the Court of Appeal) exercised appellate jurisdiction from a decision of the High Court. It is a normal component of that jurisdiction that appeals are limited to issues determined, or at least argued, in the High Court. Otherwise, one or other party is deprived of the opportunity of a hearing in the High Court on the issue, and of appellate review. For that reason, an appellate court is slow to review issues which, if argued, were not decided in the High

Court, and is slow to permit an argument to be advanced on appeal which was not made in the court below.

39 However, the jurisdiction of an appellate court in this regard is to be exercised with some flexibility: see *Lough Swilly Shellfish Growers Co-Op Society Ltd. v. Bradley* [2013] IESC 16, [2013] 1 I.R. 227. The fundamental obligation of an appellate court is to permit the parties to appeal against the decision of the lower court, and, if possible, to resolve the dispute between the parties. Perpetual litigation is not a desirable state, and particularly today when litigation is costly and when there is significant pressure on the resources of the courts, courts should, if possible, adopt a course which brings proceedings to a fair conclusion as soon as possible. The fundamental jurisdiction of an appellate court is to hear an appeal from the decision of the court below, which is the outcome of those proceedings. All of these issues were part of the within proceedings, and therefore should, if possible, be resolved. Although an application for leave to seek judicial review is an *ex parte* application, there is no difficulty in permitting a respondent to be put on notice and to address argument to the court: this course is regularly taken in the High Court. The only distinction, therefore, is the standard to be applied. In this case, in my view, it was permissible to hear argument as to the substantive issue on the basis that if the court concluded there was no substance to the point, it would uphold the refusal to grant leave to seek judicial review. If, on the other hand, the court concluded that there was substance to the point, then it would be permissible, having regard to the position taken by the Minister, to make an order on consent quashing the determination. Either way, the proceedings would end with the decision of this court. Accordingly, in my view, it is appropriate to hear and determine these issues on their merits.

40 The four grounds of appeal relied on in this regard are that it is suggested that the trial judge:-

(1) Erred in holding that the remedy of judicial review was sufficient to vindicate the applicant's fundamental European Union law right to apply for subsidiary protection and/or have a review of such decision and/or was sufficient to vindicate the applicant's rights guaranteed by Article 47 CFREU;

(2) Erred in holding that the aggregate of the remedies available to the applicant were sufficient to vindicate his European Union law rights, including his rights under Article 47 CFREU;

(3) Failed to apply the principles in *Gaydarov v. Direktor na Glavna direktsia 'Ohranitelna politsia'* (Case C-430/10) EU:C:2011:749 to the effect that an effective remedy must permit review of the legality of the decision as regards matters of both fact and law in light of European Union law.

(4) Erred in law in holding that the applicant's right pursuant to the principles of equivalence and effectiveness were not breached in the circumstances.

41 It should be noted that in written submissions to this court, the applicants indicated they were not relying on any principle of equivalence, and accordingly the only issue on this latter ground was the question of a breach of the principle of effectiveness. These four points are closely related, and in the light of the applicants' submissions can be designated as the "absence of an appeal mechanism point".

42 Lastly, in the Article 64 appeal in *J.C.M.*, the applicant appeals on the additional ground that, in the leave application, Clark J. erred in refusing to permit the applicants to argue the ground that judicial review did not provide an effective remedy because the court cannot consider additional materials which were not before the decision-maker at the time the decision was made, and erred in refusing to permit the applicant to introduce new by way of affidavit.

43 The outcome of these developments is that the court must consider on this appeal the following grounds:-

(1) Whether the facts of *M.L.* and *J.C.M.* are distinguishable from *M.M*. such as to require an oral hearing or interview in his case;

(2) The enmeshment point upon which leave was granted by Cooke J. in *V.J.*;

(3) The enmeshment point as separately formulated by Clark J. in *M.L*. and *J.C.M.*;

(4) The absence of an appeal mechanism point upon which leave was refused by Clark J.;

(5) The fresh evidence point in *J.C.M*.

Whether the cases of M.L. and J.C.M are distinguishable from M.M. so as to require an oral hearing

44 It is submitted in both cases that while the applicants had both repeated in their subsidiary protection applications the accounts which had been submitted (and found lacking in credibility) in the asylum process, there were additional factors which meant that their cases were both distinguishable from *M.M*. and were the type of exceptional case contemplated in that case which required an oral hearing. The argument in *J.C.M.* was that in addition to repeating the claim which had been submitted (and found wanting in credibility) in the asylum process, the applicant had also raised concerns in his subsidiary protection application about his treatment if returned to the DRC as a failed asylum-seeker. He relied on report in the Guardian newspaper on 27 May 2009. The Minister considered this together with further country of origin information and rejected the applicant's claims. It is now argued that, since this was an issue not raised or considered in the asylum process, it was the type of case which meant that an oral hearing was necessary before his subsidiary protection claim was rejected.

45 I cannot accept this submission. The decision in *M.M.* makes it clear that what is required is that an applicant must have an opportunity of making his or her case. Whether an interview or oral hearing is required depends on the nature of the case made, not whether

the particular point was raised in the asylum process. The type of contention made here was one which by definition was something about which the applicants could have little if any personal knowledge, nor was that suggested in their applications. It was an issue particularly suited to determination by reference to the materials relating to country of origin information, since the case made was that the applicants would suffer on return as failed asylum-seekers. That depended on a status they shared with many others, rather than any individual characteristic. That feature of the case did not, therefore, require an interview, still less an oral hearing. The applicant in *J.C.M*. also makes a related point in relation to later evidence in relation to returned asylum seekers which was not admitted in the application for judicial review, and which it is necessary to address separately when the Article 64 appeals are considered.

The enmeshment point

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* [2012] IESC 58, [2013] 1 I.R. 142, 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. At para. 54 of its judgment, the court observed:-

"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."

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.

50 Next, it is contended that the procedure under the 2006 Regulations was unfair, disproportionate and in breach of Article 47 CFREU because an application for subsidiary protection would only be considered once the applicants' temporary entitlement to remain in the State had expired.

51 In this regard, the applicants made two arguments. First, it was said that the assessment of the subsidiary protection claim against the background of the proposal to deport under s. 3(3) of the Immigration Act 1999 was unfair, disproportionate and in breach of the applicants' rights to an effective remedy, largely because of the different time limits for challenging a deportation decision and a decision in relation to a refusal of subsidiary protection. Second, they say that the applicants' position on receipt of the three options letter was analogous to that of the successful applicants in *Luximon v. Minister for Justice* [2018] IESC 24, [2018] 2 I.R. 542.

52 Prior to the commencement of s. 34 of the Employment Permits (Amendment) Act 2014 on 3 October 2014, decisions to refuse subsidiary protection were not included in the list of decisions to which the statutory provisions in s. 5 of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act") applied, which provided at the time for a 14-day time limit to challenge, among other things, deportation orders, which time limit could be extended for good reason. (Following the amendment of the section by s. 34 of the Employment Permits (Amendment) Act 2014, the relevant time limit is now 28 days). At the time of the decision in this case, subsidiary protection decisions were not included in any of the statutory regimes for limiting the period for judicial review. It followed, that at the time when *M.L.* and *J.C.M.* received their decisions on subsidiary protection, the then requirement of O. 84, r. 21(1) was that an application for leave should be made promptly and in any event within three months from the date when the ground of application arose, or six months when the relief was sought was certiorari, unless the court considered there was good reason for extending the period. At the time V.J. received a decision on his subsidiary protection application, the time limit had been altered by the Rules of the Superior Courts and was now three months from the date when the grounds of application first arose again with the possibility of an extension under O.84, r. 21(3).

53 The applicants say that once their applications for subsidiary protection were refused, they were liable to be deported at any time. It follows, therefore, that if a challenge was not brought within 14 days of the deportation order, an applicant could be deported before the end of the ordinary three or six month time limit for challenging the subsidiary protection decision has expired. This, they say, would deprive them of a right to an effective remedy under Article 47 CFREU.

54 First, it should be noted, and indeed it is fundamental to this case, that in the present case the manner in which the procedures were operated did not prevent an of the applicants from seeking judicial review of their subsidiary protection decisions: they were each in a position to challenge both the deportation order and the subsidiary protection

decisions together, and did in fact do so. This is not surprising. The process for determination of applications for international protection is quite protracted and it is well known to those practising in the field that, since it is the application for refugee status which permits entry into the State, deportation is a potential consequence of remaining in the State after an adverse determination. The possibility of applications for subsidiary protection and humanitarian leave to remain is also well known. This issue was discussed in the context in *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, in which Keane C.J., giving the judgment of the court, addressed the contention that the initial 14 day period for challenge was too short:-

> "As a preliminary observation, it should be recalled that a person who is the subject of a deportation order will have become aware in the course of the extended processing of his or her application that he or she is on real risk of becoming the subject of a deportation order. In addition, the person concerned will in the vast majority of cases have received almost three weeks' notice of the intention to make the deportation order. Once the deportation order has been notified to the person concerned there are fourteen days from the date of notification (or deemed notification as the case may be) within which to apply for judicial review and this in turn is subject to an extension at the discretion of the court. There is nothing in the section which would prohibit the person concerned from applying for an extension of the fourteen day period before that actual fourteen day period had elapsed."

55 These observations appear applicable in the present context, in which the applicants argue, in effect, that due to the absence of an explicit provision preventing deportation before a minimum time has elapsed after the refusal of subsidiary protection, and the short time limit for challenging a deportation order, it is possible that a person could be deported before the end of the ordinary three or six-month time limit for challenging his or her subsidiary protection decision.

56 The applicants argue that on receipt of the three options letter and during the processing of a subsidiary protection application, they did not have an entitlement to reside in the State, and thus were unlawfully present in the State. It is unsatisfactory that there appears to have been no express requirement that applicants for subsidiary protection should be granted temporary leave to remain in the State pending the Minister's decision on their application. That situation was remedied in Regulation 4 of S.I. No. 426/2013 - European Union (Subsidiary Protection) Regulations 2013, and subsequently in ss. 16 and 17 of the International Protection Act 2015. However, Regulation 4(5) of the 2006 Regulations provided that where the Minister determined that an applicant was not a person eligible for subsidiary protection, "the Minister shall proceed to consider, having regard to the matters referred to in section 3(6) of the 1999 Act, whether a deportation order should be made in respect of the applicant". Further, s. 3(5) of the 1999 Act provided that the provisions of s. 3(3)(b) shall not apply to a person who is outside the State, which would tend to imply that persons making representations under s. 3(3) as per the invitation in the three options letter will do so while still in the State.

57 On that basis, it appears there was no question of the applicants being deported or otherwise required to leave the State before their applications for subsidiary protection or humanitarian leave were determined. Even if it might technically be said that the applicants were, due to a gap in the legislation, "unlawfully present" in the State within the meaning of s.5(2) of the 2004 during that time, they do not show that they suffered any adverse consequence by virtue of that position.

58 Similar considerations applied to the fact that there was a 15-day time limit applicable for the making of an application for subsidiary protection following receipt of notification that their claim for refugee status had been refused. In *Danqua v. Minister for Justice and Equality* (Case C-429/15) EU:C:2016:789, the CJEU held that the 15-day time limit was contrary to the principle of effectiveness, since it did not ensure in practice that all applicants were afforded a genuine opportunity to submit an application for subsidiary protection. However, unlike the applicant in Danqua, the applicants in this case cannot show that they were adversely affected by this rule: each of their applications appears to have been made in time, and was accepted for consideration by the Minister.

59 The applicants also rely on the recent decision of this court in *Luximon v. Minister for Justice* [2018] IESC 24, [2018] 2 I.R. 542. In that case, the applicants had entered the State and resided lawfully for a considerable period on the basis of Stamp 2 student permissions until a change in the scheme promulgated in 2011 required them to apply to the Minister under s. 4(7) of the Immigration Act 2004 to vary their permission to remain to a Stamp 4 permission. The decision refusing to vary the applicants' permission in this manner required them to leave the State by a specified date, unless they obtained an alternative permission by that time. Critically, the Minister took the position that, in considering the application to vary the permission under s. 4(7) of the 2004 Act, he was not required to have any regard to the applicants' rights under Article 8 ECHR, and argued that he was only obliged to consider those rights in the context of a decision to make a deportation order.

60 This court held that there was no power under s. 4(7) of the 2004 Act to direct the applicants to leave the State. Furthermore, in order to be able to make representations under s. 3(3)(b) of the 1999 Act (including representations in relation to Article 8 ECHR) the applicants would be obliged to remain unlawfully in the State pending the deportation process, and were constrained therefore to act in an unlawful manner. This could not be lawful, or in accordance with public policy. Even if the power the Minister purported to exercise had existed, the Minister was required to act in accordance with the applicants' rights under Article 8 ECHR at the s. 4(7) decision stage, and this requirement was not met where compliance with the Minister's direction to leave the State would have meant that their Article 8 ECHR rights as members of family units would be violated in any event.

61 *Luximon* is, however, markedly different from the present cases. There was no question of a consideration of Article 8 ECHR rights in the context of the refugee or subsidiary protection applications in these cases, and consequently no question of the Minister

seeking to defer consideration of such matters until a decision on deportation. Unlike the applicants in *Luximon*, the three-options letter did not direct the applicants to leave the State. With regard to the third option offered of applying for subsidiary protection and/or making representations to the Minister under s. 3(3)(b) of the 1999 Act, there is no suggestion in the letter that the applicants were required to leave to leave the State before making an application for subsidiary protection or representations under s. 3(3)(b) of the 1999 Act. In *Luximon*, the Minister sought to make a decision which on its own terms – a direction to leave the State – necessarily affected in a real way the applicants' Article 8 rights without having regard to those rights. No such circumstance arose in these cases.

62 As already set out, McDermott J. quashed the subsidiary protection decisions challenged by the applicants in *J.C.M*. and *M.L*. on the basis of both the oral hearing point already discussed, and the second ground upon which Clark J. had granted leave, that is, that an applicant for subsidiary protection potentially carried a finding of lack of credibility with him or her from the asylum process, thereby creating a negative impression from the start. It is accordingly necessary to address that point.

63 The reasoning of the High Court judge is set out at paras. 92 to 94 of his judgment and it is clear that this conclusion was closely linked to, and consequential upon, the finding in respect of the oral hearing issue. Thus, it was concluded that the respondent had:-

> "failed to afford the applicants a fair opportunity to address issues of credibility in the subsidiary protection application. The decision-makers in each of these cases have failed to rely on any material outside the adverse credibility findings made by the Tribunal concerning the assertions of fact made by them in respect of their claims. I am satisfied on the basis of the judgment in *M.M. v. Minister for Justice* (Hogan J.) that it was essential that each of the applicants be given an opportunity to address the adverse credibility findings quoted directly in the subsidiary protection decisions from the Refugee Appeals Tribunal decisions and a fresh opportunity to revisit the matters bearing on their claims for subsidiary protection having regard to the requirement that there be a separate and independent adjudication on each of these claims".

64 It is apparent, therefore, that the conclusion of the learned trial judge in this respect was dependent on his reliance on the judgment in the High Court in *M.M. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 9, [2013] 1 I.R. 370 and the conclusion that there had to be a fully separate and independent adjudication. This conclusion cannot stand in the light of the decision of this court in *M.M. v. Minister for Justice and Equality* [2018] IESC 10, [2018] 1 I.L.R.M. 361. It does not appear to me that the point has merit when viewed on its own. It is perhaps slightly contentious to say that the credibility finding "travels with" the applicant. The asylum application and determination are part of the materials before the Minister in relation to which the applicant can make submissions. Indeed, that was the point which the CJEU emphasised in the additional paragraph in *M.M. v. Minister for Justice, Equality and Law Reform* (Case C-277/11) EU:C:2012:744:

there had to be an opportunity for the applicant to be heard in that regard and in relation to his or her application more generally. If the Minister was entitled to have regard to the asylum findings – and that is clear from the decision in *M.M.* – then there is nothing unlawful in the credibility findings being before the Minister. The applicants also argue in this regard that they were not told that this was the case, and had they been told, they would have addressed those findings. This is a point has a sense of being influenced by the manner in which the legal position has been clarified by the repeated decisions of the CJEU and this court. It suggests perhaps that the outcome of *MM* was not anticipated, and seeks to turn that to advantage by suggesting the Minister was under an obligation to inform the applicants of their rights to make submissions on matters including credibility. It is apparent that the applicants originally contended for a much different procedure. However, the Minister was not obliged to tell the applicants what the legal position was, or what matters the applicant could or could not address, so long as the Minister did not preclude submissions on any relevant matter. The applicants here were not under any constraint as to the matters they sought to advance. Accordingly, I would reject this argument.

The absence of an appeal mechanism point in *M.L.* and *J.C.M.*

65 This point arises in the Article 64 appeals in M.L. and J.C.M. The applicants argue that judicial review was the only means of challenging the refusal of their applications for subsidiary protection, and is not an effective remedy for the purposes of Article 47 CFREU.

66 It is important to recall that this point was raised and dismissed in these cases in 2012, when the application for leave to seek judicial review was made to Clark J. It is a variation of a point that has been advanced for some time in the context of the right to an effective remedy under the ECHR, and, latterly, as a requirement of European Union law, most clearly pursuant to Article 47 CFREU. The consistent position of the jurisprudence has been that judicial review in Irish law is a sufficiently flexible remedy to constitute an effective remedy, whether viewed through the prism of the CFREU, the ECHR, or indeed the Irish Constitution. It was on this basis that leave was refused.

67 By the time this case came on for hearing in this court, the argument faced the even more substantial hurdle that the issue appeared to have been addressed comprehensively and definitively by the judgment of this court in *A.A.A. v. Minister for Justice* [2017] IESC 80 (Unreported, Supreme Court, 21 December 2017), referring with approval to the prior decision of the Court of Appeal in *N.M. v. Minister for Justice* [2016] IECA 217, [2018] 2 I.R. 591.

68 The applicants, however, sought to refer to decision of the CJEU in *Secretary of State for the Home Department v. Banger* (Case C-89/17) [2019] 1 C.M.L.R. 153. The fourth question referred by the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom) in that case was whether a rule of national law which precluded an appeal to a court or tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member was compatible with Article 3(2) of Directive 2004/38 (often referred to as the Citizenship Directive).

69 The facts in *Secretary of State for the Home Department v. Banger* (Case C-89/17) [2019] 1 C.M.L.R. 153 were both complex and unusual. It appears that initially, and for some time thereafter, it had been assumed that the relevant provisions in England and Wales introduced in 2006 permitted an appeal to the tribunal system from a decision refusing a residence card to a person claiming to be an extended family member. However, in a controversial decision, the Upper Tribunal concluded on an interpretation of the Nationality Immigration and Asylum Act 2002, and implementing EEA Regulations 2006, that contrary to the submissions of both the appellant and the Secretary of State, that an appeal did not exist from a refusal by the Secretary of State to grant a residency card to a person claiming to be an extended family member: *Sala* (*EFMs: Right of Appeal*) [2016] UKUT 441 (IAC), [2017] Imm. A.R. 141. In the event, that decision was 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, UK Visa Section* [2018] UKSC 9, [2018] 3 All E.R. 177. Furthermore, new regulations came into force in 2019 providing for an appeal. However, there remained a group of cases not captured by the new regulations, and still governed by the decision in *Sala*. 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 direktsia '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, insomuch 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. 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*.

Developments since the hearing in this case

71 The applicants in correspondence have sought to draw the court's attention to further developments in European Union law, and of the development of the Banger proceedings in England and Wales. In the first place, it was suggested that the opinion of Advocate General Bobek given on 30 April 2019 in *Torubarov v. Bevándorlási és Menekültügyi Hivatal* (Case C-556/17) EU:C:2019:339 was relevant. That case was very unusual. In 2015, the Hungarian legislature had changed the competence of courts when reviewing administrative asylum decisions from having the possibility to directly alter a decision to a power to merely to annul and remit. In *Torubarov*, an application had been made for international protection in 2013. It was rejected by the administrative authority twice. Both these decisions were annulled for different reasons by the referring court and the application was then reviewed and rejected for a third time, apparently in disregard of the guidance that had been issued in the referring court. The referring court therefore asked whether, as a matter of European Union law, it could derive the power to alter the administrative decision from European Union law, and more specifically from Directive 2013/32/EU on common procedures for granting and withdrawing international protection (known as the Procedures Directive) read in the light of Article 47 CFREU.

72 Advocate General Bobek suggested that Directive 2013/32/EU read in conjunction with Article 47 CFREU meant that a model of judicial review endowed with a mere cassational power where judicial guidance is effectively being disregarded by administrative bodies fails to meet the requirements of effective judicial review set out in the directive, as interpreted in the light of Article 47(1) CFREU.

73 Despite the superficial points of comparison between *Torubarov* and this case, in that it involves judicial review in the context of an application for international protection, it is apparent that the legal issue is quite distinct. Advocate General Bobek did not find that a form of review endowed with cassational power, still less judicial review as available in Ireland, was not, in itself, an effective remedy under Article 47 CFREU which is what the applicants would require to establish if they were to succeed. Instead, it was only where the cassational power was being disregarded by the administrative power to which it was being directed, that it could be said that the power was not an effective remedy. If anything, therefore, the import of the opinion is adverse to the applicants: it is at least implied that judicial review which is complied with by the administrative bodies to which it is directed, is an effective remedy for the purposes of Article 47 CFREU. Furthermore, the decision is plainly distinguishable. Not only is there no suggestion that there is any disregard by the Minister of the decisions of the court on judicial review and asylum matters, but the power of judicial review in this jurisdiction extends to orders of mandamus, if necessary directing an administrative body to decide a case in accordance with law. I note that the CJEU has recently delivered its decision in *Torubarov v. Bevándorlási és Menekültügyi Hivatal* (Case C-556/17) EU:C:2019:626, which indeed the applicants' solicitors have also submitted to the court. For completeness I should observe that it does not appear to me that it contains anything that advances the applicant's contentions.

74 More recently, the applicants have returned to the *Banger* case. It was stated in further correspondence that at the hearing reliance had been placed by the applicants in M.L. and J.C.M. in respect of the effective remedy argument on the recent judgment of the CJEU in *Secretary of State for the Home Department v. Banger* (Case C-89/17) [2019] 1 C.M.L.R. 153 and it had been pointed out that the judgment had not been interpreted by the UK referring court but was due for hearing. The letter further stated: "You will recall the issue related to whether judicial review was an effective remedy". The letter stated that the barristers' chambers involved in representing the claimants case in the *Banger* case had announced that the Secretary of State for the Home Department had withdrawn the impugned regulations and was due to introduce regulations providing for a right of appeal, that accordingly there would be no need for a substantive case to be heard, and that the claimant had been invited to withdraw the claim for judicial review. It was said that the approach of the United Kingdom authorities showed their understanding of the Banger decision was that Article 47 CFREU required a full merits appeal. It should be observed at this point that for the reasons set out above, the issue in *Banger* did not relate precisely to "whether judicial review was an effective remedy". Rather, it related to the somewhat unusual circumstances which had arisen in England and Wales following on the decision in *Sala*.

75 Recently, the solicitors for the applicants wrote to this court again, stating that the statement made that the proceedings in *Secretary of State for the Home Department v. Banger* (Case C-89/17) [2019] 1 C.M.L.R. 153 were to be withdrawn was inaccurate, and that in fact the matter had proceeded to a hearing and had resulted in a recent decision of the Upper Tribunal (Immigration and Asylum Chamber). They contended that the conclusion of the Upper Tribunal was that the European Union law required a redress process more akin to a statutory appeal rather than judicial review. The decision of the Upper Tribunal (Lane J. and Judge Rimington) was, it appears, delivered on 10 April 2019, and is to be found at [2019] UKUT 194 (IAC). At para. 40 of the judgment, it is stated:-

> "40 There are two points which indicate from the judgment that a full merits appeal and thus a statutory appeal is required. First, the judgment refers to a redress procedure which must be able to decide whether the refusal decision was founded on a sufficiently solid factual basis. The nature of that redress procedure is more aligned with the process in a statutory appeal than judicial review. Secondly, the Secretary of State has effectively recognised this aspect of the judgment by producing legislation in express recognition of that ruling, which offers a statutory appeal."

76 It is contended on behalf of the applicants that the fact that the judgment was interpreted in this way by the courts of one Member State gives rise at least to a situation where it cannot be said that the law is clear, and therefore a reference to the CJEU is required.

77 I cannot accept this contention. It is apparent from the judgment of the Upper Tribunal, and indeed the judgments which precede it, that the background to that case in terms of the statutory provisions it involved was particularly obscure, and the different turns taken

in the case law prior to the decision meant that the area was particularly complex and distinct. Furthermore, the Upper Tribunal commented adversely upon the approach of the Secretary of State and the apparent dilatoriness in making available the residency permit to the applicant, which had been promised in the public announcement made by the Secretary of State of the proposed introduction of new regulations. In those circumstances, the Upper Tribunal proceeded to determine an appeal which might otherwise have been regarded as moot.

78 It is apparent that the issue in that case arose in very particular circumstances which were unique to England and Wales, and far removed from the fundamental issue raised here – whether judicial review in Ireland is an effective remedy for the purposes of Article 47 CFREU. It is noteworthy that there was only a single basis for the Upper Tribunal's interpretation of the judgment of the CJEU in *Secretary of State for the Home Department v. Banger* (Case C-89/17) [2019] 1 C.M.L.R. 153 as requiring a statutory appeal, namely that it was considered that the reference to establishing that the decision was founded on sufficiently solid factual basis was considered to be "more aligned with the process of statutory appeal than judicial review". For reasons already addressed, I respectfully doubt that this conclusion can in fact be drawn from the decision of the CJEU, certainly as far as the Irish legal system is concerned, which is, of course, the only issue arising in this case.

79 The question of whether judicial review in Ireland can be said to be an effective remedy for the purposes of the ECHR or the CFREU is one which has been widely considered in Irish courts, and on which at the moment the law is clear, as illustrated most recently by the decision in *A.A.A. v. Minister for Justice* [2017] IESC 80, (Unreported, Supreme Court, 21 December 2017). As has been noted, the process of judicial review as applied in Ireland generally, and perhaps specifically in the field of international protection, is both a flexible and powerful remedy. Decisions may be reviewed for legality, procedural error, irrationality, proportionality, and compliance with and protection of rights under the Constitution and the ECHR, rights under European Union law, and the rights protected by the Charter. It is a necessary feature of any system of judicial review that the court is not empowered to rehear issues and substitute its own findings of fact for those of the deciding body. Furthermore, that limitation is intrinsic to any concept of judicial review, and has the corresponding feature that in some cases review may be more extensive, since a decision may be quashed for an error which was capable of being corrected on a merits appeal. In any event, the law in this regard in Ireland must be regarded as settled, and I am not persuaded that the relatively fragmentary allusions and references raised by the applicants are sufficient to raise the sort of doubt that would require a reference to the CJEU. That is particularly so in the context of an area of law, and a series of decisions, which have already been at least indirectly the subject of two references in the *M.M.* litigation. The function of national courts is to decide cases in the light of the guidance provided by the CJEU. The procedure for a reference to the CJEU is not an end in itself. For these reasons, I conclude that the applicants' contention that they were entitled to a form of appeal on the merits from a decision on an application for subsidiary protection, itself necessarily following a hearing and appeal on the question of

refugee status, is incorrect. Nor can I accept the applicants' contention that the decision of the Upper Tribunal raises a sufficient doubt about the matter as to require this court to make a reference to the CJEU under Article 267 TFEU. For reasons already addressed, the position in Irish law is clear and has been recently and authoritatively clarified. The relevant portion of the decision in *Banger* does not appear to me to be of sufficient weight to cast doubt on something very well-established and of very wide application.

The refusal to admit fresh evidence in J.C.M.

80 Finally, it is necessary to address the argument advanced that Clark J. wrongly refused to admit fresh evidence in the application for judicial review in *J.C.M.* This was evidence about a further report about the position of failed asylum seekers in the DRC. It was admitted that it post-dated the Minister's decision by many years but was available at the time of the judicial review application. I do not think this is in truth a separate ground of complaint. It is rather an illustration of the point the applicants sought to make as to the limitation of the judicial review process: that is, that the absence of a full appeal on the facts meant that they could not refer to such material. However, this is merely a consequence of the procedure for judicial review. Clark J. would only have been wrong to refuse to admit the evidence if, contrary to the decision of this court, a full appeal on the merits was required by European Union law. The decision does not mean that the applicants could not deploy the information if it was really telling. It might, for example, be the basis of an application to the Minister to reconsider the decision. In other circumstances, it might have been relevant in the judicial review proceedings, or other judicial review proceedings depending on the point formulated, but when it was sought to be introduced as part of a *de novo* appeal to invite the court to decide that the Minister was wrong on the merits, or indeed that subsidiary protection should now be granted to the applicants , it was plainly outside the judicial review process and was correctly excluded. It follows, for the reasons set out above, that the appeal against the refusal of Clark J. to grant leave to seek judicial review on this point must be dismissed.

81 Finally, it will be apparent that this judgment has had to address a number of matters raised in correspondence after the oral hearing of the appeal had concluded. I have dealt with these issues in the judgment because they were capable of being disposed of and it was undesirable to further delay the resolution of this case by further sequential hearings. However, the process of communicating with this or any other court after a hearing has concluded must be approached with some caution. Where a court invites the parties to clarify a matter, there will of course be little difficulty. Similarly, a party may wish to correct an incorrect statement of fact or law. However, more difficult issues arise when it is sought to address matters of legal argument.

82 An appeal to this court is normally confined to identified points of law which have been the subject of written decisions in the High Court, and often the Court of Appeal, and which in turn will have been addressed in detailed written submissions and oral argument. The application for leave to appeal, the written submissions, and the prior judgments, are all publicly available, and the oral argument takes place in open court. The process culminating in that hearing is not intended to be merely the opening act in a long-running

drama: as has been observed, like any trial, the hearing is the opening and closing night of the show. Every litigant experiences what is sometimes called *l'esprit d'escalier*: the thought that there is something more that could have been said, or said better or differently, or some materials to which reference might usefully have been made. In a system where new judgments are delivered daily, and where courts in other common law countries often generate judgments on similar issues, it would indeed be surprising if the necessary lapse of time between argument and judgment did not produce at least some material, whether a decision in this jurisdiction or elsewhere, or commentary or other authority, which could be said in some way to touch upon the matters addressed in the hearing. These features are, however, not sufficient in themselves to justify communication with a court which is not carried out in public or publicly available. The fundamental justification for any post-hearing communication with a court on any contentious issue is if the new matter is considered sufficiently significant as to affect the outcome of the case, and which would require to be the subject of a further hearing and argument, such as, for example, the delivery of a decision considered binding on the court. If the parties are agreed on the significance of a matter, it may be put before the court by agreement. If there is agreement about its significance but debate about the particular impact, and it is considered that full argument is required, then this should be communicated to the court with a request for a short hearing and directions as to the delivery of written submissions and material. If the parties disagree, then the party contending that a further hearing is required should bring such an application on notice to the other party inviting the court to direct a hearing and seeking directions.

83 It must be obvious, however, that this is a matter upon which circumspection and judgment is required to be exercised, particularly by parties with the benefit of legal advice. It is undesirable that further issues and arguments as to substance should be raised in correspondence, particularly in a case such as this which has seen a considerable proliferation of issues during its extensive lifetime. In circumstances where the judgment of the CJEU in *Secretary of State for the Home Department v. Banger* (Case C-89/17) [2019] 1 C.M.L.R. 153 had been referred to in argument, it was appropriate to draw the court's attention to the decision of the Upper Tribunal on the interpretation of that judgment and I am do not criticise the parties' representatives in this case in any way. It is important, however, that parties should not consider that the hearing of an appeal is only one part of the process, and that there can be a further running correspondence with the court outside of the public hearing. In the circumstances of this case, it is not necessary to dwell on these matters further, and I touch on them now only to provide guidance for the future.

84 For the reasons set out in this judgment, I would allow the Minister's appeal in each case, dismiss the applicants' cross-appeals, and set aside the orders of the High Court quashing the decisions of the Minister.