Neutral Citation Number: [2012] IEHC 44

THE HIGH COURT

JUDICIAL REVIEW

2011 129 JR

BETWEEN

N. D.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 2nd day of February 2012

1. The applicant is a national of Nigeria who arrived in the State in February 2010 and claimed asylum. His application for refugee status was based on his claim to have become implicated in the death of a friend with whom he was travelling when the two of them were stopped by police and the friend was shot by the police. The friend's father was, he claimed, the deputy governor of a Nigerian state, and as such, a powerful and influential man and a notorious "godfather". It is said that notwithstanding the acknowledgement by the police that the applicant was entirely innocent, the friend's father held him responsible for his son's death and was determined to find and kill the applicant. He claimed that he had been advised by the police to flee.

2. The applicant's claim was the subject of a negative recommendation by the Office of the Refugee Applications Commissioner in a report under s. 13(1) of the Refugee Act 1996, dated the 11th March, 2010. In effect, the report rejected the claim as lacking credibility because it was based upon the uncorroborated assertion of the applicant and it was considered implausible that if the son of a deputy state governor had been murdered the event would not be reported in the media.

3. An appeal to the Refugee Appeals Tribunal was lodged against the s. 13 Report, but was subsequently withdrawn upon legal advice on the basis that the source of the applicant's claim to a fear of serious harm was a personal threat from a particular individual and was not therefore one with a Convention nexus. On that basis an application for subsidiary protection was made to the respondent by letter dated the 3rd August, 2010. The application for subsidiary protection was based upon the same facts and events relating to the murder of the applicant's friend and the subsequent threats from the friend's father as had formed the basis of the claim for asylum.

4. Although the appeal against the s. 13 Report was withdrawn the application for subsidiary protection purported to "firmly reject" the findings of lack of credibility reached in that report. The application for subsidiary protection also sought to "clarify and correct" a number of aspects of the asylum claim which were accepted as being untrue. He had, for example, originally claimed to have flown from Nigeria to Libya and, having travelled by road for some eighteen hours, to have boarded a ship that took him to Ireland. In fact he now says that he had travelled to Ireland by plane from Lagos to Dublin, with a stopover in Turkey. He had also first claimed that his travel to Ireland had been arranged and paid for by a pastor he had met and stayed with when he had fled from Port Harcourt. In the application for subsidiary protection he acknowledged that his travel had been arranged and paid for by an uncle through an agent who had provided the passport and travel documents and then taken them back on arrival. In addition, he acknowledged that a declaration of age submitted in support of his asylum application was not a genuine document, but had been obtained for him by a cousin in Nigeria - although the stated age was his true age.

5. The application for subsidiary protection was refused by a letter dated the 8th December, 2010, which enclosed the memorandum containing the examination and determination of the application (the "Determination"). On the 13th January, 2011, the respondent Minister made a deportation order in respect of the applicant. This was communicated to the applicant under cover of a letter dated the 18th January, 2011, which also enclosed the memorandum by way of "Examination of file" (the "File Note") setting out the assessment of the statutory considerations under s. 3(6) of the Immigration Act 1999, which led to the making of the order.

6. In this judicial review proceeding as commenced on the 11th February, 2011, the applicant seeks by way of primary reliefs orders of *certiorari* quashing the above decisions to refuse the application for subsidiary protection and to make the deportation order. When originally commenced, the application in respect of the decision refusing subsidiary protection was based upon a copy of the determination which transpired to be missing a number of pages. By order of the 21st February, 2011, this Court granted leave to the applicant to amend the original statement of grounds so as to include four additional grounds which were said to arise out of the contents of a full text of that determination.

7. In the applicant's written submissions and at the hearing the main focus of the argument was directed at the issue considered at paragraph 28 *et seq* below namely, the alleged invalidity of the deportation order by reference to Regulation 4(5) of the 2006 Regulations. However, the application for leave to seek judicial review of the subsidiary protection refusal is not covered by the requirements of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (the "Act of 2000") so that the lower threshold of order 84 RSC applies rather than that of "substantial grounds" which does, of course apply to the challenge to the deportation order. For that reason and because there cannot be a validly enforceable deportation order until an application for subsidiary protection has been definitively determined, it is appropriate to deal first with the application in respect of the determination.

The Subsidiary Protection Determination

8. As explained above, by order to the Court of 21st February, 2011, the applicant was granted leave to amend the statement of grounds so as to include four additional grounds L-O which were said to arise out of consideration of the full text of the determination following receipt of pages missing from the version originally furnished.

9. While these grounds are formulated somewhat densely, the essential flaws alleged against the determination appear to be as follows:

> "L. The use made of and reliance placed upon country of origin information was flawed in that it was selective, unbalanced and unfair;
>
> M. The assessment of the availability of state protection to the applicant in Nigeria was flawed in that there was a failure to assess whether an effective legal system for the detection, prosecution and punishment of acts of serious harm existed and the conclusions reached by the respondent were unreasonable and irrational having regard to the country of origin information;
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> N. The assessment by the respondent of the availability of protection against serious harm to the applicant in Nigeria by internal relocation was flawed and failed to comply with the requirements of Regulation 7 of the EC (Eligibility for Protection) Regulations 2006 (the "2006 Regulations");
>
> O. The respondent acted in breach of fair procedures in dealing with credibility in that he failed to 'engage with or have regard to the explanations and clarifications set out on behalf of the applicant'."

10. In addressing these grounds an introductory or general proposition common to them but reflected particularly in Ground O, was made arising out of the fact that, as mentioned above, the applicant had on legal advice withdrawn the appeal against the s. 13 Report to the Tribunal so that the disputed findings of lack of credibility in the report had not been subjected to challenge and re-examination by a Tribunal member as might otherwise have been the case. The application thus sought to have the Minister reopen and reconsider those findings. It was submitted that, having regard to the importance of the rights at stake, "there was a heightened requirement on the Minister to afford extra vigilance and care to the application and to adopt a more thorough and engaging approach to the application, having regard for the absence of any secondary or appellate consideration of the applicant's refugee status application". It was further argued that there had been "no engagement" with the representations made in the subsidiary protection application which sought to address each of the credibility findings "despite the fact that such submissions represented the first occasion on which such findings were addressed and countered on the applicant's behalf with the benefit of legal advice".

11. Accordingly, in the subsidiary protection application it was sought to challenge the negative findings on credibility in the s. 13 Report and to invite the respondent to determine that application on the basis of the explanations then offered as to why he should have been believed. In the judgment of the Court, these arguments are not well founded because they fail to appreciate the essential procedural character of the international protection process which forms the basis of the common asylum system of the European Union.

12. As pointed out in a number of recent judgments of the Court (see for example *BJSA [Nigeria] v Minister for Justice* [2011] IEHC 381) Ireland is now the only Member State which does not operate a unified or "one-stop" procedure for a joint application for international protection of both kinds, namely, refugee status and subsidiary protection and under which a single decision making authority considers the asylum application first and then, if asylum is refused, immediately considers whether the applicant qualifies for subsidiary protection on the basis of the claim as assessed at that stage.

13. Although Regulation 4 (1)(a) of the 2006 Regulations requires a deportation proposal made under s. 3(3) of the Act of 1999, to invite a failed asylum seeker to make a separate application for subsidiary protection when the refusal of refugee status under s. 17(1) has been decided, the process remains, in the judgment of Court, a continuing and coherent examination of the status of the applicant in international and European Union law in which the Minister as the decision maker in respect of subsidiary protection is entitled – and indeed obliged – to take into account the findings made in the asylum process and which have of course been accepted by him as the basis for his refusal of the declaration under s. 17(1) of the Act of 1996.

14. The scheme of the 2006 Act when taken in conjunction with the provisions of the Acts of 1996 and 1999 in complementing the asylum process, presupposes that the application for subsidiary protection will have been examined in the first instance during the asylum process before it comes to be considered under the Regulations by the Minister. It follows, in the view of the Court, that where the s. 13 Report (or for that matter the decision of the Tribunal on appeal) has found that an asylum seeker's claim is implausible or lacks credibility such that the events described or the facts relied upon are considered not to have happened or not to have involved the applicant, there is no obligation on the Minister to reconsider the same facts or events and to decide whether they should be considered plausible or credible in the light of explanations given in the application for subsidiary protection; at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers. To require the Minister to do so would effectively convert an application for subsidiary protection into a form of a second appeal against the refusal of a declaration of refugee status.

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

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

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

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

18. In the judgment of the Court, therefore, this assertion that the Minister was obliged to reassess the issue of the applicant's personal credibility is unfounded and ignores both the scheme embodied in the provisions of the Refugee Act 1996, as complemented by the European Community (Eligibility for Protection) Regulations 2006, and the nature of the issue which faces the protection decision makers in these circumstances. That issue is not whether an individual identified as the source of the threat of serious harm is shown in country of origin information to be a notorious "godfather" figure in the way described. The issue is whether, in the absence of any corroboration of the applicant's own verbal assertions, the applicant is to be believed in claiming that he himself was the target of similar threats or violence from the individual in question. The decision-maker must ask the question whether the applicant is to be believed or whether this is an instance where an applicant, knowing of the verifiable reputation of the alleged source of serious harm, is opportunistically seeking to exploit it in order to create for himself a credible scenario which supports his claim for protection.

19. The matters advanced in the letter of the 3 August, 2010, as the basis for the subsidiary protection application by way of challenge to the credibility findings in the s. 13 Report, are in reality an elaboration of the same facts and events relied upon in the asylum claim and at the s. 11 Interview. In effect the Minister is being asked to reconsider the issue of credibility and come to a different conclusion.

20. In the judgment of the Court, this is not the function of the respondent when dealing with an application for subsidiary protection which is based on the same facts and events considered and determined in the s. 13 Report (or for that matter in a Tribunal appeal decision) and which the Minister has accepted as the basis for the decision refusing a declaration of refugee status under s. 17(1) of the 1996 Act. If findings of fact, including findings of lack of credibility, are to be challenged as has been sought to be done in this case, that challenge must be made by way of appeal to the Tribunal. Where personal credibility is in dispute, it is by means of the independent assessment of the Tribunal member at an oral hearing that the dispute falls to be resolved in the scheme of the 1996 Act and the 2006 Regulations. This is so in the judgment of the Court, even in a case in which it is accepted that the facts and events relied upon, will not establish the existence of a Convention nexus even if they are found to be credible.

21. Accordingly, although Ireland is the only Member State to maintain an international protection procedure in separate stages for subsidiary protection and for the asylum process, it is nevertheless appropriate in the view of the Court, to construe and apply the arrangements of the 1996 Act, together with the 2006 Regulations, so far as is consistent with the wording of those provisions, so as to give effect to subsidiary protection as a status which complements refugee status by providing an additional form of international protection against serious harm to an applicant who has established the reality of that risk, but from a cause or source which falls outside the terms of the Geneva Convention.

22. It follows in the judgment of the Court, that where factual claims including those turning on credibility, have been examined and rejected in the asylum process and have formed the basis of the Minister's refusal of the declaration which is a precondition to the subsidiary protection application, the Minister cannot be compelled by the making of the latter application to reopen and reconsider the same facts, events and assertions. This can only be done, in the judgment of the Court, by means of the statutory appeal to the Refugee Appeals Tribunal.

23. Accordingly insofar as the determination is based on the rejection in paragraph 8 of the applicant's entitlement to the benefit of the doubt based upon the findings made in the s. 13 Report, no arguable case for the grant of leave based upon Ground O. of the amended statement of grounds is made out. The application for subsidiary protection did not allege that the s. 13 Report was in any sense mistaken or erroneous in its understanding of the factual basis of the claim made. As pointed out above, the letter of the 3rd August 2010, merely elaborated upon the claim as originally made and sought to urge the Minister to reach a different conclusion. In the judgment of the Court the Minister was entirely correct in declining so to do.

24. This apparent misconception as to the scheme for international protection applications embodied in the provisions of the Act of 1996 and the 2006 Regulations and particularly as to the role of the Minister in determining eligibility for the complementary protection of the subsidiary protection on the basis that an applicant is found not to be a refugee, must be taken into account when assessing the remaining matters advanced as grounds L. – O. above.

25. Under the heading of ground O. the determination is also said to be flawed in that it is ambiguous: it is unclear whether the Minister has proceeded on the basis of accepting the applicant's account of events in his home country or whether this has been rejected.

26. In the judgment of the Court, this assertion is clearly untenable in the light of the express terms of the determination. It is true, of course, that in various places in the analysis, the memorandum makes observations or reaches conclusions on the basis that the applicant's account is "taken at its face value" or on the basis "if the applicant's account is to be believed". These are, however, comments made in the context of pointing to the availability of protection to the applicant in the event it should be necessary by means of internal relocation or state protection. It must be borne in mind that immediately before the final paragraphs in which the recommendations are accepted and the determination is formally made, there is explicit consideration of "The applicant's credibility and whether the benefit of the doubt, if any, should be given". Here the memorandum quotes extensively from the passages dealing with credibility in the s.13 Report and then cites the corrections made in the subsidiary protection application to the untruths admitted to have been contained in the asylum claim (see paragraph 4 above). In the typed text of the determination the finding is stated: "In view of these discrepancies in the applicant's account of his claim, I find that he has not earned an entitlement to the benefit of any doubt". This has been added to in a handwritten notation by the officer who formally made the determination: "Agreed. Overall account implausible, quite apart from the travel details altered". In the judgment of the Court, there can be no doubt but that the determination has been made on the basis that the applicant's personal account of facts and events in Nigeria leading to his departure was not believed to be true. Even in the absence of any obligation to reopen credibility issues this was a conclusion which the decision maker was entitled to reach given the fact that the attempt to challenge the earlier findings was accompanied by the admission of untruths in parts of the original account given.

27. The further amended grounds L, M and N are in various ways and in general terms directed at the contents and analysis set out in

the determination. They allege a failure to have proper or adequate regard to the submissions and to country information furnished in the application with particular regard to the references to the availability of state protection or internal relocation in Nigeria and the assessments made of those issues. For much the same reasons as are given below at paragraph 46 in relation to the corresponding grounds advanced in respect of the deportation order, the Court considers that these grounds fail because they are predicated on an assumption that the factual basis of the applicant's claims and representations had been or should have been accepted.

The Deportation Order

28. As already mentioned above, the main focus of the arguments advanced on behalf of the applicant at the leave hearing, was directed at what was said to be a failure on the part of the respondent to comply with the alleged requirement of Regulation 4(5) of the 2006 Regulations in relation to the order in which the applications for subsidiary protection and leave to remain were dealt with. That provision is as follows:

> "Where the Minister determines that an applicant is 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."

29. It is submitted that having regard to the contents of and the dates and signatures appearing in the determination of the subsidiary protection application as compared with those of the examination of file memorandum supporting the deportation order, it is clear that the Minister "proceeded to consider" the making of the deportation order before the subsidiary protection application had been determined. Furthermore, the procedure adopted was said to be unfair in that the outcome of the subsidiary protection application had been prejudged by the prior consideration given to the making of a deportation order.

30. The respective chronologies of the two memoranda can be summarised as follows:

Subsidiary Protection Determination

> 19/11/2010: the text and recommendation is signed off by Sarah Bates, Executive Officer (who is presumably responsible for the drafting of the memorandum).
>
> 29/11/2010: the recommendation is endorsed by Mr. Martin O'Mahony, Higher Executive Officer.
>
> 7/12/2010: The formal determination is signed by Michael P. Flynn, Assistant Principal.
>
> 8/12/2010: The date of the covering letter sending the determination to the applicant, signed by Sarah Bates.

The Examination of File Note.

> 29/9/2010: The memorandum with its recommendation is first signed by Sarah Bates, Executive Officer, who, again, is presumably responsible for the first draft.
>
> 3/12/2010: The first page of the memorandum is endorsed by hand by M. O'Mahony: "I agree with Ms. Bates assessment and I support the recommendation that the Minister sign the prepared deportation order."
>
> 7/12/2010: M. Flynn, Assistant Principal, endorses the first page: "I have considered the case file of Mr. Debisi and I agree that the Minister should make a deportation order in respect of him. He has failed the asylum process and I do not consider that the granting of leave to remain in the State is warranted in his case".

The first page is also stamped "Approved by Minister" accompanied by the signature of M. Flynn, but without a date.

> 13/1/2011: The formal deportation order is signed and sealed by D. Ahern, the Minister for Justice and Law Reform.
>
> 18/1/2011: The letter with the deportation order is sent to the applicant enclosing the file examination note and requiring the applicant to leave the State by the 4th February. It is signed by Eamon J. Bennett of the Repatriation Unit.

31. It can thus be seen that the work of composing the draft determination of the subsidiary protection application was first signed off by Sarah Bates, on the 29th November, 2010, while her draft of the File Note for the deportation order was signed off by her on the earlier date of the 29th September, 2010. On the other hand the formal determination of the subsidiary protection application was made by M. Flynn on the 7th December, 2010, which was the same day that he endorsed the recommendation for the deportation order. The actual deportation order, however, was made, signed and sealed by the Minister in person on the later date of the 13th January, 2011. It is in the context of this chronology that it is argued that, contrary to the requirement of Regulation 4 (5) of the 2006 Regulations the Minister, through Sarah Bates, did in fact "proceed to consider" the making of the deportation order long before the Minister (again through Ms Bates) prepared the draft recommendation for the determination of the subsidiary protection application.

32. According to the applicant, Regulation 4(5) "imposes a strict statutory duty as to the order in which the applications should be considered" and when read in conjunction with Regulations 2 and 3 there must be no consideration of the making of a deportation order until after the subsidiary protection application has been definitively determined. This is said to be consistent with the express terms of the letter sent to the applicant under s. 3(3) of the Immigration Act 1999, which explicitly informs the applicant of "the order in which your case will be decided" namely: "the Minister will make a decision on your eligibility for subsidiary protection first. . . . If your application is not successful or you have not made an application for subsidiary protection your representations under s. 3 of the Immigration Act 1999, will be considered. If the Minister decides to refuse your representation under s. 3 . . . you will be made the subject of a deportation order".

33. In the applicant's submission, the crucial words "proceed to consider" admit of no ambiguity and the paragraph must therefore be construed so as to give effect to what is said to be its plain meaning. On this basis the plain meaning of the words "proceed to consider" is said to be equivalent to "start to think about" or "commence the examination of" the possible making of a deportation order.

34. In advancing these arguments, counsel for the applicant faced the obstacle created by the fact that this ground had been rejected as unfounded by the Court in two judgments of the 16th March, 2011, and the 4th May, 2011, in *O.O. and Another v. MJELR* [2011] I.E.H.C. 165 and [2011] I.E.H.C. 175. In the first of those two judgments, the ground now sought to be advanced was

rejected for the reasons set out particularly at paragraphs 20-21. In the second judgment the Court refused an application for a certificate of leave to appeal against the earlier judgment under s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, on a point of law directed at the correct interpretation of Regulation 4(5). The essential points made by the Court on this issue in those two judgments could be summarised:

> - That the "consideration" referred to was the Minister's personal deliberation and his decision on the making of a deportation order and not the preparatory work of collating information, analysing the representations and drafting a recommendation;
>
> - That the argument was based on an excessively literal construction of Regulation 4(5) which ignores the reality of the administrative decision making process;
>
> - That it attributed an exaggerated significance to the preparatory work done on such a file by officers in the decision making hierarchy;
>
> - It does not follow from the Carltona principle that because a statutory function performed by an official will be attributed to the Minister on whom it has been conferred, that all work done by any official in relation to the function must also be taken to have been done by the Minister.

35. Faced with this obstacle, counsel for the applicant addressed it head on and submitted that the Court's findings in those judgments were clearly wrong and ought not to be followed. At the very least, he submitted, there was sufficient room for doubt as to a possible alternative interpretation to constitute a substantial ground for the grant of leave in the present case.

36. The Court was thus tactfully exposed to a detailed analysis of its judgments and to a forceful explanation of their errors. However, having heard and seriously considered the arguments and having since re-read the submissions and the earlier judgments, the Court must regretfully confess that it finds itself unconvinced.

37. At the heart of the issue is the proposition that the words "proceed to consider" have one plain meaning in this context namely that nothing must be done towards the making of a deportation order until after the subsidiary protection application has been finally determined. In other words, "to proceed" is used in the sense of "to start".

38. In the view of the Court, this argument overlooks the fact that, like many words, the word "proceed" can take on a different sense, depending upon the context in which it is used. A man may set out to walk from A to C and pause for a meal midway at point B and then be said to "proceed to his destination". In that context the word has the clear sense of continuing something already commenced or in train.

39. Indeed, that would appear to be the primary meaning of the word "proceed" as defined in the Oxford Dictionary and illustrated by literary quotation:

> *(i) "Go or travel forward, esp. after stopping or after reaching a certain point; resume one's movement or travel. G. Greene: "After a short . . . conversation they proceeded . . . to a quiet and secluded restaurant."*
>
> *(ii) "Carry on, continue or resume an activity or action esp. in a specified manner; …. continue or resume speaking; adopt a course of action". (Shorter Oxford Dictionary: 6th Ed. 2007 vol 2 p. 2355.)*

40. In the view of the Court, it is this sense of "resume" or "continue" which is the clear intent of the 2006 Regulations and this is so because it is part of the scheme of the statutory instrument in giving effect to the Qualifications Directive to situate the new subsidiary protection process within the existing scheme of s. 3 of the 1999 Act and to adapt it to the latter procedure. Thus, the subsidiary protection procedure begins with an application made under Regulation 4(1) in response to the letter sent under s. 3(3)(a) of the 1999 Act, notifying the failed asylum seeker that the Minister proposes to make a deportation order. In other words, the first step in the deportation process has already been taken by the decision to notify the proposal. Where, in response, the Minister receives the subsidiary protection application and leave to remain representations, the deportation process is interrupted by the requirement to determine the subsidiary protection application first. Once that determination is made, however, Regulation 4(5) requires the Minister to resume the consideration of his original proposal to make a deportation order and to do so in the light of the representations received for leave to remain. In the view of the Court it is in that sense of resuming or continuing the procedure already initiated with the notification of the deportation proposal that the words "proceed to consider" are used in Regulation 4(5).

41. For these added reasons, the Court remains of the view expressed in the two earlier judgments. In its judgment, there is no ambiguity about the phrase used in Regulation 4(5) and the explicit placing of the subsidiary protection process within the scheme of the deportation process of s. 3 of the 1999 Act, demonstrates a clear intention that an application for subsidiary protection, when made, must be determined before a deportation order is made, but does not "impose a strict statutory requirement" that no preparatory work by officials may be done on the deportation file until after the subsidiary protection determination has been finalised.

42. There remain a number of ancillary grounds canvassed in the amended statement of grounds in relation to the deportation order which can be addressed relatively briefly having regard to the Court's two main findings above namely:

> A. No arguable ground has been made out as to the invalidity of the determination because, firstly, there was no duty upon the Minister to re-examine the negative findings of credibility in the s. 13 Report and, secondly, having regard to the admitted untruths in the account originally given by the applicant and the absence of any new material demonstrating that the earlier negative findings were clearly wrong in fact, the Minister was in any event entitled to conclude that the applicant was not eligible for subsidiary protection as a person who had suffered past serious harm or was at real risk of future serious harm if returned to Nigeria;
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> B. No substantial ground has been made out as to the invalidity of the deportation order by reason of its having been made before the determination because the order had in fact been made on the 13th January, 2011, by the Minister personally while the determination had been made on the earlier date of the 7th December, 2010, by a different person and the preparatory work on the file note was not precluded by the use of the expression "shall proceed to consider" in Regulation 4(5).

43. So far as concerns the deportation order, the remaining grounds C. to J. (grounds A. and K. were concerned with the missing pages) can be grouped as follows. Grounds C., D. E. and F. are in effect variations on ground B. or comprise alleged illegal

consequences of the infringement of Regulation 4(5). It is said that the Minister, acting through the officials, prejudged the determination of the subsidiary protection application by the work done on the file note prior to 7th December, 2010: that they presumed the applicant would not be eligible and thereby breached fair procedures and the applicant's legitimate expectations as to the basis upon which the leave to remain application would be considered.

44. In the judgment of the Court, these arguments are unfounded. The preparatory work done by the officials concerned was simply that; preparatory work by way of summarising, analysing and drafting. Prejudgment which vitiates a decision making process can only be prejudgment or bias on the part of the actual decision maker. Here there were only two such decision makers; Mr. Flynn, in the determination and the Minister in the deportation order. Although it is true that Mr. Flynn also annotated the recommendation for the Minister in the file note, thereby approving the draft recommendation to be made to the Minister, the Minister remained entirely free to make his own judgment on the case and to decide differently.

45. Grounds G. to J. are in various ways directed at the contents and analysis in the file note and allege its inadequacy as to a series of conclusions on the representations made by reference to the applicant's rights to protection under s. 5 of the Refugee Act 1996, Articles 2 and 3 of the European Convention of Human Rights and Article 40.3 of the Constitution. Ground H. alleges an error of fact in the file note insofar as the Minister is said to have treated the leave to remain representations as making the same case as had been made to the Office of the Refugee Applications Commissioner. The ground further asserts that proper regard was not had to information contained in country reports and submissions.

46. In the judgment of the Court, these grounds too, have not been made out as giving rise to a substantial issue which would warrant the grant of leave. They are, in effect, predicated upon an assumption that the factual background to the applicant's claims and representations had been or should have been accepted. As already pointed out above, the case made in the representations of the 3rd August, 2010, as to the risks and threats to be faced by the applicant if repatriated was a reiteration and elaboration of the alleged events and consequences resulting from the death of the son of the deputy governor. The observations made and conclusions reached in the file note must be read in the light of the fundamental fact that the applicant was not believed in his claim that these events happened and that he had been involved in them. As already pointed out above, the information in country reports insofar as it could be said to have been new in the representations of the 3rd August, 2010, was information of a general character directed at both general conditions of violence, unrest and corruption in the areas concerned and at the notorious reputation of the deputy governor. It did not go any further in corroborating the applicant's claim to any link with the deputy governor, let alone the fact of his son's violent death.

47. For all of these reasons the Court is satisfied that no case has been made out which would warrant the grant of leave to seek judicial review of either of the decisions sought to be challenged in this proceeding.