



**UNAPPROVED  
THE COURT OF APPEAL**

**Neutral Citation Number [2021] IECA 106  
Appeal Number: 2018/229**

**Donnelly J  
Faherty J.  
Binchy J.**

**BETWEEN/**

**F. M.**

**APPLICANT/APPELLANT**

**- AND -**

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

**RESPONDENT**

**- AND -**

**Appeal Number: 2018/245**

**BETWEEN/**

**S. O.U.**

**APPLICANT/APPELLANT**

**-AND-**

**THE MINISTER FOR JUSTICE AND LAW REFORM**

**RESPONDENT**

**Judgment of Ms. Justice Faherty dated the 12th day of April 2021**

1. These two appeals come before the Court from a judgment and orders of the High Court (Humphreys J.) dated 17 April 2018 dismissing the appellants' applications for orders of *certiorari* quashing the decisions made by the respondent ("the Minister") not to grant them subsidiary protection. The challenges brought by F.M. and S.O.U. concern the procedures followed by the Minister pursuant to the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations") in deciding their subsidiary protection applications.

2. The 2006 Regulations transposed into law Directive 2004/83/EC of 29 April 2004 ("the Qualifications Directive") which provides for the establishment of minimum standards for qualification for refugee status or subsidiary protection. The 2006 Regulations remained in force until 2013 and operated in the context of a system whereby applicants seeking refugee status were dealt with under the statutory scheme set up by the Refugee Act 1996, as amended ("the 1996 Act"). That scheme established the Office of the Refugee Applications Commissioner ("ORAC") with a right of appeal to the Refugee Appeals Tribunal ("RAT"), followed thereafter by a decision of the Minister to grant or refuse a declaration of refugee status. Under the 2006 Regulations, the ability to apply for subsidiary protection was confined to those persons whose applications for asylum had been refused. Once a decision refusing asylum was made a person could then apply for subsidiary protection. The system in place was commonly referred to as the "bifurcated" system.

3. The 2006 Regulations were replaced by the European Union (Subsidiary Protection) Regulations 2013 (S.I. 426/2013) ("the 2013 Regulations"). The 2013 Regulations, in turn, have been replaced by the International Protection Act 2015 ("the 2015 Act") which established a common procedure for the examination of asylum and subsidiary protection

applications. Thus, the type of written subsidiary-protection determination procedure conducted by the Minister's officials in cases such as the present no longer takes place. Rather, applicants for international protection have their applications heard and determined following an interview at first instance and then, if unsuccessful, by way of an oral appeal to the International Protection Appeals Tribunal ("IPAT").

4. It is no understatement to say that the procedure provided for in the 2006 Regulations for the determination of subsidiary protection status has been the subject of myriad challenges in the courts in this jurisdiction and the subject of a number of references to the Court of Justice of the European Union (CJEU). Indeed, both F. M.'s and S.O.U.'s leave applications, initiated, respectively, in 2012 and 2011, were effectively paused to await the outcome of references made to the CJEU concerning the 2006 Regulations.

5. To turn now to F.M.'s and S.O.U.'s respective circumstances.

**F.M.**

6. F.M. is a national of Pakistan. He arrived in the State in November 2010 and applied for asylum. Following interview by ORAC on 26 January 2011, he was subsequently notified that the report on his case pursuant to s.13(1) of the 1996 Act recommended that he not be granted a declaration of refugee status. He lodged an appeal to the RAT which was unsuccessful. By letter of 18 January 2012, he was informed of the Minister's decision to refuse him refugee status. F.M. was advised that consequent on the refusal his entitlement to stay in the State temporarily had expired. The 18 January 2012 letter (commonly referred to as the "three-options letter") went on to advise that the Minister proposed to make a deportation order in respect of him under s.3 of the Immigration Act 1999, as amended ("the 1999 Act"). He was told that there were three options open to him: to leave the State before the Minister decided on a deportation order

(Option 1); to consent to a deportation order (Option 2), or to make an application for subsidiary protection and/or submit representations to the Minister under s.3 of the 1999 Act setting out the reasons as to why a deportation order should not be made against him (Option 3). F.M. was advised that if he chose Option 3, the order in which his case would be decided was as follows:

“...The Minister will make a decision on your eligibility for subsidiary protection first. If your application for subsidiary protection is successful, you will be allowed to remain in the State for three years (this will be reviewed at the end of three years).

...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 (as amended) will be considered.

...If the Minister decides to refuse your representations under s.3 of the Immigration Act 1999 (as amended), you will be made the subject of a Deportation Order. You will no longer have the option of leaving the State voluntarily without a deportation order.”

7. By letter of 28 March 2012, F.M.’s then solicitors applied on his behalf for subsidiary protection application and sought leave to remain pursuant to s. 3 of the 1999 Act. On 1 June 2012, the Minister was informed that F.M. wished to withdraw his applications and repatriate voluntarily to Pakistan. However, on 3 July 2012, the Minister was informed that F.M. believed that he could not safely return to Pakistan and the Minister was requested to reactivate the subsidiary protection and leave to remain applications.

- 8.** On 23 July 2012, Ms. Louise Clarke, an Executive Officer in the Minister's Department, prepared a report relating to F.M.'s subsidiary protection application which recommended that the application should be refused.
- 9.** On 24 July 2012, Ms. Clarke prepared a report in relation to the leave to remain application wherein she recommended that F.M. should not be granted permission to remain and that a deportation order should be made.
- 10.** In his affidavit sworn 16 March 2018 in the within proceedings, Mr. Alan King Assistant Principal Officer in the Minister's Department, described Ms. Clarke's report as "an advisory document" "prepared on the working assumption that the Higher Executive Officer [Ms. Lorraine Lee] who determined the subsidiary protection application would follow the negative recommendation in the [subsidiary protection] report of 23<sup>rd</sup> July 2012".
- 11.** F.M.'s file and Ms. Clarke's two reports were duly furnished to Ms. Lee, who was authorised by the Minister to make the decision on the subsidiary protection application.
- 12.** On 31 August 2012, Ms. Lee approved Ms. Clarke's report and made a decision refusing F.M.'s subsidiary protection application. Ms. Lee's manuscript note, as appears on Ms. Clarke's report, states that she considered the subsidiary protection application and the analysis prepared by Ms. Clarke and that she agreed with the latter's recommendation. F.M. was notified of the decision on 6 September 2012.
- 13.** On 31 August 2012 also, Ms. Lee considered Ms. Clarke's report of 24 July 2012 which recommended the deportation of F.M. She recorded (in manuscript) her agreement with that recommendation at the top of the first page of the report, writing "I have read and considered the content of this file and I agree with the recommendation."
- 14.** F.M.'s file, including the report of 24 July 2012 recommending his deportation, was duly forwarded to Mr. Noel Waters, Director General of the Irish Naturalisation and

Immigration Service and the person authorised by the Minister to exercise her power under s. 3 of the 1999 Act. On 27 September 2012 Mr. Waters adopted the recommendation that F.M. be deported and duly signed a deportation order on that date.

**15.** On 9 October 2012, F.M. was informed that the Minister had decided to make a deportation order, a copy of which was enclosed.

**16.** F.M. was not in fact deported. By letter of 15 July 2015, he was notified by the Minister that he was being issued with a residence card as a family member of an EU citizen. It was stated that if a deportation order had been issued in respect of him it would be revoked, which duly happened.

**17.** As already alluded to (in para. 4 above), although leave to seek judicial review was initiated on 4 December 2012, F.M.'s leave application was not moved until 9 October 2017. On that date he obtained leave to apply by way of judicial review for an order of *certiorari* quashing the decision of the Minister refusing his subsidiary protection application on grounds (e)(i)(vi) of his statement of grounds. F.M.'s Statement of Grounds had also challenged his deportation order but, as stated that had been revoked by the time leave was granted. At the within appeal hearing, the Court was advised that *certiorari* in respect of the subsidiary protection decision was being sought only on grounds (iv) and (v) as follows:

“(iv) The Minister acting through the officials in his Department assumed that the subsidiary protection application of the Applicant would be unsuccessful prior to a valid and conclusive decision being made on that application and thereby prejudged the outcome of that application by embarking on the Deportation Order decision-making process prior to a valid and conclusive decision being made on the Applicant's eligibility for subsidiary protection and the decision

refusing the Applicant subsidiary protection was accordingly made in breach of fair procedures.

- (v) The Minister acting through the officials in his Department over-committed himself to presuming that the Applicant would not be eligible for subsidiary protection such that significant resources were allocated to proceeding to consider whether to make a Deportation Order prior to a valid and conclusive decision refusing subsidiary protection having been made and as such the Applicant's eligibility for subsidiary protection was pre-judged and/or appeared to an independent observer to have been pre-judged and/or the Minister through his officials has engaged the rubber-stamping exercise in carrying out the statutory function of determining the Applicant's eligibility for subsidiary protection.

**S.O.U.**

**18.** S.O.U. is a national of Nigeria who arrived in the State aged 16 in 2007 in the company of her step-mother and elder sister. Initially, she was granted leave to remain until October 2007, later extended to December 2007. Following the return of her stepmother and sister to Nigeria, S.O.U. went to live with her older brother who was already resident in the State. She went on to complete her secondary school education in a school in the Midlands.

**19.** According to her affidavit evidence, it appears that she initially presented at ORAC in or about June 2008 intending to apply for refugee status. She was not dealt with at that stage apparently for reasons connected with her documentation. She asserts that her passport was taken from her at that stage. As she was underage, she was advised to return at a later stage with her brother in attendance. She returned to ORAC two days later in the company of her brother. However, the officer with whom she had contact was not there.

She was told that her brother would be contacted. She states that no contact was made with her brother. Ultimately, on 9 July 2009, she made her application for asylum on grounds of persecution for reasons of membership of a particular social group and religion. She also claimed to have been sexually abused as a child. She claimed that she was in fear of inhuman and degrading treatment in Nigeria, of ill-treatment at the hands of her step-mother (who had returned to Nigeria) and local criminal elements. She stated that she would not be safe as a young woman in Nigeria.

**20.** On 30 July 2009 S.O.U. was advised that ORAC were recommending that she should not be declared to be a refugee. This recommendation was upheld on appeal by the RAT who found her fears not to be well founded. S.O.U.'s appeal to the RAT was on the papers only. This was on foot of a recommendation by ORAC pursuant to s. 13(1) of the 1996 Act that the provisions of s.13(6)(c) were applicable, namely that without reasonable cause, she had failed to make her asylum application as soon as reasonably practicable.

**21.** By letter of 30 December 2009, S.O.U. was informed that the Minister had decided to refuse her refugee status. She was given the three options as previously described and in like manner to the case of F.M., her three-options letter outlined the order in which her case would be decided if she were to choose Option 3 (apply for subsidiary protection and/or make representations to remain temporarily in the State).

**22.** On 21 January 2010, S.O.U.'s then solicitors submitted a leave to remain application and indicated their intention to apply also for subsidiary protection. The subsidiary protection application was duly filed on 19 May 2010.

**23.** On 19 January 2011, Ms. Valerie Kerr, Executive Officer, prepared a report relating to the subsidiary protection application following which she recommended that the application be refused. On the same date, she prepared a report in respect of S.O.U.'s leave

to remain application. Ms. Kerr recommended that S.O.U. should not be granted permission to remain and that a deportation order should be made.

**24.** S.O.U.'s file and both reports were then furnished to Ms. Máire Ní Fheinneadha, Higher Executive Officer. On 20 January 2011, Ms. Ní Fheinneadha approved the subsidiary protection report and recommended that the subsidiary protection application be refused. On the same date, Ms. Ní Fheinneadha went on to consider Ms. Kerr's report relating to deportation and recorded her agreement with the recommendation on the first page of the report.

**25.** The reports were then forwarded to Mr Michael Flynn, Assistant Principal, the person empowered by the Minister to make the final subsidiary protection decision. On 21 January 2011, Mr. Flynn determined that S.O.U. was not eligible for subsidiary protection (albeit that the file examination that accompanied the decision letter of 25 January 2011 suggested that she was eligible-agreed by all to be a typographical error).

**26.** On 21 January 2011 also, Mr. Flynn indicated his agreement with Ms. Ní Fheinneadha's recommendation that the Minister should make a deportation order in respect of S.O.U. as in his view leave to remain was not warranted.

**27.** S.O.U.'s file was subsequently forwarded to the Minister who decided on 26 January 2011 to make a deportation order. S.O.U. was advised of the deportation order by letter dated 31 January 2011.

**28.** S.O.U. was duly deported to Nigeria in July 2015.

**29.** S.O.U.'s leave application issued in 2 March 2011. For reasons already outlined, it lay in abeyance until 9 October 2017, when she was granted leave to challenge both the subsidiary protection decision and the deportation order on the grounds set out at (e) (iii) - (xi) of her Statement of Grounds.

**30.** At the judicial review application before the High Court the challenge to the deportation order was not pursued. Counsel for S.O.U. has confirmed to this Court that relief is being sought only in relation to the subsidiary decision on grounds (iii) and (iv) of the Statement of Grounds (essentially grounds similar to those upon which F.M. relies and which are recited above) and grounds (v) and (vii) which state:

“ (v) The Respondent acted in breach of Regulation 4(5) of the [2006 Regulations] in that the Respondent proceeded to consider whether to make a deportation order against the Applicant without the statutory condition precedent being satisfied of a valid and conclusive determination that the Applicant was not a person eligible for subsidiary protection and the decision to make the deportation order was made without jurisdiction.

...

(vii) The Respondent has acted in breach of the Applicant’s legitimate expectation that her application for subsidiary protection would be considered and a valid and conclusive decision taken on that application prior to the Respondent embarking on consideration of whether to make a deportation order following the recommendation of the Respondent made by letter of 30 December 2009 that such would be the order in which the Applicant’s case would be decided by the Respondent.”

### **The High Court judgment**

**31.** As already set out, both judicial review applications came on for hearing before Humphreys J. on 17 April 2018 and were dealt with in a single judgment delivered on that date. It reads as follows:

“1. These are two further *M.M.*-related challenges to subsidiary protection refusals (see *M.M. v. Minister for Justice and Equality* [2018] IESC 10). I have heard

helpful submissions from Mr. David Leonard B.L. (with Mr. John Finlay S.C.) for the applicant and Ms. Kilda Mooney B.L. for the respondents in *S.O.U.*, and from Mr. Michael Conlon S.C. (with Mr. Leonard) for the applicant and Mr. Daniel Donnelly B.L. for the respondent in *F.M.*

2. The first question is whether reg. 4(5) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) applies to the ultimate decision-maker or to intermediate officials, so as to preclude preparing draft deportation papers prior to finalisation of the protection claim. The respondents rely on the judgments of Cooke J. in *O.O. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 165 (Unreported, High Court, 16th March, 2011), *O.O. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 175 (Unreported, High Court, 4th May, 2011) and *N.D. (Nigeria) v. Minister for Justice and Equality* [2012] IEHC 44 (Unreported, High Court, 2nd February, 2012) and as followed by O'Regan J. in *B.I. v. Minister for Justice and Equality* [2016] IEHC 642 (Unreported, High Court, 8th November, 2016). The applicant's interpretation is that officials of the Department of Justice and Equality should not be permitted to prepare a deportation order proposal prior to a final decision on subsidiary protection. However, there is clearly no legal problem with them doing so. I entirely agree with the judgments of Cooke J. and O'Regan J. and follow them.

3. The second point is that there is an appearance of bias because resources have been expended on deportation reasoning before a final subsidiary protection refusal. That is also dealt with by Cooke J. in the foregoing judgments and again I entirely agree with and follow those decisions.

4. A third point is made about legitimate expectation but that issue is not strongly pressed and seems to be of no substance.

5. Insofar as there is any implicit suggestion that the subsidiary protection/deportation procedures should not be related procedurally, I rejected that in *N.M. v. Minister for Justice and Equality* [2018] IEHC 186 [2018] 2 JIC 2710 (Unreported, High Court, 27th February, 2018).

6. Mr. Conlon helpfully agrees that if I take the approach of following previous High Court jurisprudence, then his application should be dismissed. The overall point is that officials can prepare for a number of scenarios and that does not bind the Minister or the ultimate decision-maker. It is often highly appropriate and helpful in terms of efficient public administration to have such preparatory work done. That does not prejudice an ultimate decision. It is certainly not appropriate for the court as part of the judicial branch of government to interfere with that or to dictate how such matters of public administration are organised; and certainly not to interfere in such a negative way as to preclude the doing of legitimate and reasonable preparation for a number of possible outcomes in any process, whether administrative or otherwise.

7. Both applications are dismissed.”

### **The appeals**

32. The grounds of appeal are identical in both cases. The Minister opposes the appeals on all grounds. Without having to rehearse in detail the contents of the notices of appeal and the responses thereto I regard it as sufficient to identify what arises for determination in these appeals, as gleaned from the notices of appeal, the responses to the appeals and the parties’ submissions.

### **The legal issue arising**

33. The following issue arises for determination:

Whether the work done by the Minister's officials on the preparation of documents on which a deportation order decision would be taken and which was done prior to the appellants being the subject of a final subsidiary protection refusal decision, rendered their respective subsidiary protection decisions unlawful by reason of:

- (i) Breach of Regulation 4(5) of the 2006 Regulations;
- (ii) Bias or prejudice, or the appearance of bias or prejudice of the subsidiary protection decision; and
- (iii) Breach of procedural legitimate expectation.

**(i): Alleged failure to apply the provisions of Regulation 4(5) of the 2006 Regulations**

**34.** Regulation 4(4) and (5) of the 2006 Regulations provides:

“(4) Where the Minister determines that an applicant is a person eligible for subsidiary protection, the Minister shall grant him or her permission to remain in the State.

(5) 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.”

The appellants contend that on a plain reading of Regulation 4(5), subsidiary protection applicants are entitled to expect that their applications for subsidiary protection and their representations under s.3 of the 1999 Act would be decided and considered in the order specified in Regulation 4(5), namely that it would only be after the determination on the subsidiary protection application has concluded that the Minister would “proceed to consider” whether a deportation order should be made. It is contended that Regulation 4(5) demands a literal interpretation consistent with the purpose of the 2006 Regulations

and it is thus neither permissible nor necessary to resort to a purposive interpretation of that provision. It is submitted that the interpretation of Regulation 4(5), as contended for by the appellants, is mandated to avoid the reasonable apprehension of objective bias arising out of prejudgment and to secure the appellants' right to a fair consideration of their subsidiary protection applications, as required by constitutional justice and their EU entitlement to a fair hearing under EU law. The appellants submit that the fact that the decision-making process in respect of their respective subsidiary protection applications was interwoven with preparatory work in relation to the deportation process breached the clear import of Regulation 4(5).

**35.** The Minister's position is that the appellants' argument is not supported by caselaw.

**36.** The construction which the appellants wish to put on Regulation 4(5) was considered in *O.O. v. Minister for Justice and Equality* [2011] IEHC 165. In that case what was under challenge was both the subsidiary protection decision and the deportation order. In the challenge to the deportation order it was claimed that, having regard to the dates of various steps taken in arriving at the two decisions, the Minister had breached Regulation 4(5) because a "consideration" of the matters set out in s.3(6) of the 1999 Act had taken place before the decision on the subsidiary protection was taken.

**37.** Cooke J. viewed "*the very literal construction*" of Regulation 4(5) being contended for as "*inappropriate*", stating:

*"Where the Regulation speaks of the Minister 'proceeding to consider' the making of a deportation order, it is the personal consideration on the part of the Minister himself which is referred to. Neither the Regulations nor s.3 of the Act of 1999 precludes efficient organisation of the work involved in preparing memoranda for the consideration of the Minister for these decisions, nor requires that it be undertaken in any particular sequence or order. It is clearly consistent with*

*administrative efficiency and with consistency in reaching coherent decisions on related files involving interconnected applications by the same persons, that the preparatory work of collating and analysing all necessary information be carried out in or about the same time. When the results with recommendations are presented to the Minister for his decisions, what is required is that the Minister should make his decision on the application for subsidiary protection before making the decision on the deportation order. Provided the matter is addressed in that order, there is no reason why the Minister might not make the two decisions on the same day.” (at para. 21)*

**38.** In the same case (*O.O. v. Minister for Justice and Equality* [2011] IEHC 175), when considering an application for a certificate under s.5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000 following his earlier substantive judgment, Cooke J. addressed the issue in the following terms:

*“... Regulation 4(5) clearly requires that the subsidiary protection determination be made first. The only question raised here is whether the expression "proceed to consider" is a direction that the Minister shall next decide the deportation issue or whether it is equivalent to "shall only then begin to think about" making a deportation order.”*

**39.** He held that Regulation 4(5) did not bear the latter meaning.

**40.** Cooke J. went on to confirm his interpretation of Regulation 4(5) in *N.D.(Nigeria) v. Minister for Justice* [2012] IEHC 44. In that case, the deportation order was challenged on the basis that the Minister had “proceeded to consider” the making of the order before the subsidiary protection application was determined. The argument advanced by the applicant was that Regulation 4(5) imposed a strict statutory duty as to the order in which the applications should be considered. It was argued that Regulation 4(5) read in conjunction

with Regulations 2 and 3 permitted no consideration of the making of a deportation order until after the subsidiary protection application has been definitively determined. This was said to be consistent with the express terms of the three-options letter sent to the applicant under s. 3(3) of the Immigration Act. Once again, the argument was rejected by Cooke J:

*“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. In the present cases, counsel for the appellants acknowledges that his submission as to how Regulation 4(5) is to be interpreted is contrary to the decisions of the High Court in *O.O. and N.D. (Nigeria)*. He submits, however, that these cases were wrongly decided. He argues that in light of the decisions of the CJEU in *M.M. v. Minister for Justice Equality and Law Reform* (Case C- 277/11) [2013] I WLR 1259 and *M.M. v. Minister for Justice (No. 2)* (Case C- 564/14) [2017] 1 WLR 1631, and the resulting decision of the Supreme Court in *M.M. v. Minister for Justice* [2018] IESC 10, the reasoning of Cooke J. in *N.D.*

(*Nigeria*) is clearly unsustainable. It is contended that the *M.M* judgments have clarified that an applicant in the subsidiary protection process under the 2006 Regulations had a right to a process guaranteeing natural/constitutional justice. Counsel thus asserts that if Cooke J. had had the benefit of the *M.M.* line of jurisprudence prior to deciding *N.D.* (*Nigeria*), he would have been bound to consider the construction of Regulation 4(5) in a different light.

**42.** The Minister argues that the appellants are mistaken in their contention that *O.O.* and *N.D.* (*Nigeria*) have been undermined or overtaken by the various judgments in the *M.M.* cases. She asserts that Cooke J.'s interpretation of Regulation 4(5) has not been doubted in any subsequent case. It is submitted that there is no authority to suggest that the right to be heard as a matter of EU law, as set out in the *M.M.* jurisprudence of the CJEU, requires any particular sequencing to be employed.

**43.** I note that the argument regarding the construction of Regulation 4(5) which the appellants make was also considered in *B.I. v. Minister for Justice and Law Reform* [2016] IEHC 642, a judgment which postdates the decision of the CJEU in *M.M. v. Minister for Justice Equality and Law Reform* (Case C- 277/11) [2013] I WLR 1259 and the subsequent judgment of the referring judge, Hogan J., in *M.M.* ([2013] I.R. 370).

**44.** The facts in *B.I.* were similar to the present cases in the sense that on a particular date, recommendations refusing the applicant's subsidiary protection and leave to remain applications were made by an Executive Officer in the Minister's Department. Sometime later, namely on 6 December 2010, Ms. Lee, Higher Executive Officer, approved both recommendations. On 10 December 2010, Mr. Carroll, Assistant Principal, made the final approval in respect of the subsidiary protection application and on 13 December 2010 he approved the recommendation to deport the applicant, following which the Minister signed a deportation order on 16 December 2010.

45. It fell to O'Regan J. in *B.I.*, to consider whether Cooke J.'s rulings in *O.O.* and *N.D.(Nigeria)* had been affected by the by the decision of the CJEU in Case-C 277/11, and indeed the judgment of Hogan J. in *M.M.* which followed on from the CJEU judgment. She found that they had not, stating:

*“22. Having considered the European Court of Justice ruling in M.M. in 2013 and the subsequent order of Hogan J. in M.M. I am not satisfied that either case deals with the views expressed by Cooke J. in the case of M.D. (sic) or O.O. concerning the timing of the applications contemplated in Regulation 4(5) and I am not satisfied that the case of M.M. has any impact on the findings as to timing made by Mr. Justice Cooke in those cases.”*

***The M.M. jurisprudence***

46. As the appellants rely on the decisions of the CJEU in *M.M.* (Cases C-277/11, [2013] 1 WLR 1259 and Case C-560/14, [2017] 1 WLR), and the resulting decision of the Supreme Court in *M.M. v. Minister for Justice* [2018] IESC 10, as authorities for the argument that Regulation 4(5) does not admit of any preparatory work being done in relation to a leave to remain application until the subsidiary protection application has been determined, it is necessary, to put the argument into context, to consider what was at issue in those cases.

47. In Case C-277/11, the question referred by Hogan J. to the CJEU concerned a case where an applicant sought subsidiary protection after refusal of refugee status and where it was being proposed to refuse the subsidiary protection application. The question was whether those circumstances required the Member State (in light of the requirement in Article 4(1) of Directive 2004/83/EC (“the Qualifications Directive”) for Member States to cooperate with applicants) to supply the applicant with the results of the assessment before a final decision was made on the subsidiary protection application. The CJEU answered the

question in the negative, ruling (at para. 95) that the provisions of the Qualifications Directive did not require a Member State to advise an applicant that it proposed to reject his application so as to entitle him to make his views known in that regard. However, the CJEU went on to state, with regard to the bifurcated system that operated in this State:

*“...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.”* (at para. 95)

**48.** Once back in the High Court, the point which had been raised by the applicant in *M.M.* which had resulted in the referral to the CJEU could not succeed, in light of the CJEU’s ruling.

**49.** It is the case, however, that *M.M.* found its way back to the CJEU again a few years later, this time consequent on a reference by the Supreme Court. It arose in the following circumstances. In the High Court Hogan J. had rejected the applicant’s ground which had formed the basis of the first reference to the CJEU but nevertheless held that because of the ruling of the CJEU (as quoted above), it was necessary to quash the subsidiary protection decision the Minister had made because of the comments the CJEU had made about 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”*. Hogan J. formed the view, *inter alia*, that in order for a subsidiary protection hearing to be effective it required the applicant to be invited by the Minister to comment on any adverse credibility findings which arose in the asylum application; to be given a fresh opportunity to revisit all matters bearing on the claim for subsidiary protection; and to be afforded a completely fresh assessment of his credibility.

**50.** Upon the Minister’s appeal, the Supreme Court formed the view that it was not clear what the CJEU had meant by the *“right to be heard”* and, accordingly, the Supreme Court referred the following question to the CJEU:

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

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

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

*39. Indeed, having regard to the nature of the elements referred at [36] of the present judgment, it cannot, in principle, be ruled out that they may be effectively*

*brought to the attention of the competent authority by means of written statements by the applicant for subsidiary protection or of an appropriate form prescribed for that purpose, accompanied, where appropriate, by the documentary evidence which he wishes to annex to his application.*

...

*56. In the light of all the foregoing considerations, the answer to the question referred is that the right to be heard, as applicable in the context of Directive 2004/83 does not require, as a rule, that, where national legislation, such as that at issue in the main proceedings, provides for two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, the applicant for subsidiary protection is to have the right to an interview relating to his application and the right to call or cross-examine witnesses when that interview takes place.*

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

**52.** Following the CJEU’s ruling, the Supreme Court handed down its judgment in *M.M. v. Minister for Justice and Equality & Ors* [2018] IESC 10, [2018] 1 I.L.R.M. 361)

allowing the Minister’s appeal of Hogan J.’s order. At para. 25, O’Donnell J. stated:

*“...The decision of the European Court of Justice makes it clear that it (sic)in the Irish context which existed at the time of the decision here, and where the decision on subsidiary protection was a separate decision taken after the determination of*

*the asylum process, it was permissible to make that decision on the basis of a written procedure, so long as the procedures adopted were sufficiently flexible to allow the applicant to make his case. That was plainly the case here. Exceptionally, it may be necessary to permit an oral interview ...The decision of the ECJ also makes it clear that it is permissible to have regard to the information obtained in the asylum process, and the assessment of the decision-maker. There is in this case no basis for contending for an oral hearing, still less for an adversarial hearing...”*

**53.** Having reviewed the *M.M.* line of jurisprudence, upon which the appellants rely, I am not satisfied that those cases have either overtaken or undermined the pronouncements of Cooke J. the *O.O.* and *N.D. (Nigeria)* on the construction of Regulation 4(5). I so find for the following reasons. What was in issue in *M.M.* was the efficacy of the bifurcated procedure for asylum and subsidiary protection applications, as described earlier, and the parameters of an applicant’s right to be heard in a subsidiary protection application. While the appellants’ written submissions contrast the pronouncements of the CJEU (at paras, 87-92) with the pronouncements of Cooke J. in *N.D. (Nigeria)* in aid of the construction which they put on Regulation 4(5), I see nothing in the *M.M.* line of jurisprudence that lends support to the argument that Regulation 4(5) of the 2006 Regulations did not permit the type of preparatory work in relation to the leave to remain applications which was undertaken by the Minister’s officials until after their subsidiary protection claims were determined. Furthermore, there is nothing to suggest that the appellants’ right to be heard (which they undoubtedly had) was not respected in the subsidiary protection processes, or that this right was somehow interfered with by the fact that officials at a lower level to the respective subsidiary protection decision-makers had embarked on preparatory memoranda in respect of their leave to remain applications in advance of a decision being made on the subsidiary protection applications.

**54.** Accordingly, notwithstanding the argument which counsel for the appellants advances, I do not agree that the construction put on Regulation 4(5) by Cooke J. offends the principle (the right to be heard) enunciated by the CJEU in Case C-560/14, or that Case-C-560/14 is authority for the proposition that Cooke J.’s analysis and interpretation of the words “proceed to consider” in Regulation 4(5) cannot now be countenanced. I am satisfied to adopt the reasoning of Cooke J. in *N.D. (Nigeria)* to find that the Minister’s consideration (in the sense referred to in Regulation 4(5) of the 2006 Regulations) of deportation matters commenced (in the case of S.O.U.) when the Minister embarked, in the words of Cooke J., on her “*personal deliberation*” and “*decision on the making of a deportation order and not the preparatory work of collating information, analysing the representations and drafting a recommendation.*” In the case of F.M., consideration on the question whether to grant him leave to remain or deport him commenced when Mr. Waters (the person delegated to make the deportation decision) embarked on his personal deliberation of the leave to remain application. In both cases, the deportation consideration commenced *after* the subsidiary protection applications had been determined.

**55.** The appellants’ argument that that the deportation consideration commenced when Ms. Clarke (in F.M.’s case) and Ms. Kerr (in S.O.U.’s case) prepared draft recommendations on the leave to remain applications is, in my view, in the words of Cooke J. “*based on an excessively literal construction of Regulation 4(5) which ignores the reality of the administrative decision making process.*”

**56.** The appellants, of course, contend that the consideration of deportation matters by officials in the Minister’s Department prior to the determination by the Minister of the subsidiary protection applications is indicative of bias or pre-judgment on the part of the Minister *vis a vis* her consideration and determination of the subsidiary protection applications, an issue to which I now turn.

**Issue (ii): Alleged bias/breach of constitutional justice**

57. The case made by the appellants is that, in respect of each of them, consideration of the making of a deportation order occurred prior to their respective applications for subsidiary protection having been determined, which, it is argued, constituted a breach of fair procedures and bias and prejudgment - or the appearance of prejudgment- in each case.

58. Part of the argument made on behalf of the appellants in aid of their claim of objective bias or prejudgment is that the preparatory work recommending deportation carried as out by Ms. Clarke (in the F.M. case) and Ms. Kerr (in S.O.U.'s case ) and the subsequent approval of same by Ms. Lee (in the F.M. case) and Ms. Ní Fheinneadha and Mr. Flynn (in S.O.U.'s case) constituted, in effect, preliminary steps taken by the *Minister* in relation to the deportation of the appellants, when one applies the *Carltona* principle to that work.

59. The *Carltona* principle derives from *Carltona Limited v. Commissioners of Public Works* [1943] 2 All ER 560. As explained by Greene L.J. at p. 563:

*“...the duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case.”*

60. The principle has been expressly approved in this jurisdiction (see *Tang v. Minister for Justice* [1996] I.L.T.R. 46 and *Devanney v. District Judge Shields* [1998] I.L.T.R. 46.)

61. Somewhat more recently, the doctrine was discussed in *WT v. Minister for Justice and Equality* [2015] IESC 73, where McMenamin J. opined:

*“It is now well recognised in the law that each minister must both bear political responsibility to the Dáil, and legal responsibility in the courts, for actions taken by their own departments. In law, ministers are regarded as being one and the same as the government departments of which they are the political heads. Conversely,*

*departmental officials act in the name of the minister. In making administrative decisions, therefore, discretion is conferred on a minister, not simply as an individual, but rather as the person who holds office as head of a government department, which collectively holds a high degree of collective corporate knowledge and experience, all of which is imputed to the political head of the department. Frequently a minister's officials will prepare documents for consideration, consider objections, summarise memoranda, and outline a policy approach to be taken by the Minister as an integral part of the decision-making process. Part of this arrangement, identified as the eponymous Carltona principle, is that the functions entrusted to departmental officials are performed at an appropriate level of seniority, and within the scope of responsibility of their government department. No express act of delegation is necessary. When the principle became a recognised part of Irish law, it was characterised as being a 'common law constitutional power' ..."*

**62.** As outlined above, counsel for the appellants rely on the *Carltona* principle to impute to the Minister the preparatory work and recommendations of Ms. Clarke and Ms. Lee with regard to F.M.'s leave to remain application, and the preparatory work and recommendations of Ms. Kerr, Ms. Ní Fheinneadha and Mr. Flynn with regard to S.O.U.'s leave to remain application. He submits that the *Carltona* doctrine operates not only with regard to the final decision but also to the process of consideration leading up to that decision. He thus suggests that the Minister "considered" the issue of deportation before a final decision was taken on the respective subsidiary protection applications, which it is argued, carries with it the appearance of bias or pre-judgment of the appellants' subsidiary protection applications.

**63.** Similar reliance was placed on the *Carltona* principle in *O.O.* ([2011] IEHC 175). Cooke J., however, did not find the principle at play stating:

*“It does not follow from the fact that a statutory decision taken by an official will be treated as having been made by the Minister and not as an unlawful delegation of the Minister’s power, that everything done by an official in the course of routine duties must be treated as if it had been done personally by the Minister...what was at issue in the present case was not the actual discharge of the Minister’s statutory function of making a deportation order under s.3(1) of the Act of 1999 (which was in fact exercised personally by him several weeks after the determination of the subsidiary protection application,) but purely preliminary and preparatory work of laying the ground for the ultimate taking of the decision. The Carltona doctrine might well be applicable if the executive officer in the present case had purported to make the deportation order...”*

**64.** In *N.D. (Nigeria)*, Cooke J. did not resile from the view he expressed in *O.O.* (See para. 34)

**65.** Despite the findings of Cooke J. in *O.O.* and *N.D.(Nigeria)*, counsel for the appellant submits that as a matter of law, *any* decision of an official in a ministerial department is made by the minister. Accordingly, he asserts that the *Carltona* principle applied to the earlier stages of the decision-making process in these cases, in aid of his argument that it was the Minister who, in legal theory, carried out the preparatory work that ultimately led to the decisions to deport the appellants. The crux of the appellants’ argument is that having engaged on such preparatory work on the deportation side prior to any determination having been made on the subsidiary protection applications, the Minister cannot therefore be said to have reached her decision on the subsidiary protection

applications in a fair or impartial manner. Counsel fairly conceded to the Court that he could not cite any authority for the argument he advances.

**66.** In the course of her judgment in *B.I.*, O'Regan J. addressed arguments similar to those being advanced by counsel for the appellants in these appeals. She stated:

*“23. In his O.O. decision Cooke J. dealt with and considered the Carltona principles and the Devanney case and was satisfied that it did not follow from these cases that the fact that a statutory decision taken by an official will be treated as having been made by the Minister that everything done by an official in the course of routine duties must be treated as if it had been done personally by the Minister. He was of the view that in that case (as in the instant case) what was being considered was the preliminary and preparatory work laying the ground for the ultimate taking of the decision and he admitted that the Carltona doctrine might well be applicable if the executive officer in the case before him had purported to make the deportation order.*

...

*25. I do not accept that Cooke J.'s overview of the Carltona principles is not supported by the subsequent decision of *W.T. v. Minister for Justice & Ors.* [2015] IESC 73, being a decision of the Supreme Court delivered on 31st July, 2015. In that case Charleton J. indicated that:-*

*"The core of the Carltona principle is that as a matter of statutory construction responsible officials may exercise some of the statutory [powers] of a minister. The officials would not consult him but may yet recite words such as "I am directed by the minister". They are the alter ego of the minister. They exercise devolved power."*

*In the matters which came before Cooke J.,(being identical to the matters raised in the within proceedings) the Carltona principles were not in fact engaged as the work under review was the preparation and approval of reports prior to any final determination and did not involve the exercise of a statutory power but rather involved officials carrying out routine duties which carried no weight or authority until such time as same might have been acted upon namely, by the ultimate decision to refuse subsidiary protection.”*

**67.** Notwithstanding counsel for the appellants’ argument, I find no basis to depart from the views expressed by Cooke J. and O’Regan J., respectively, in *O.O.* and *B.I.* I am satisfied that the work done on the issue of deportation by Ms. Clarke and Ms. Lee in F.M.’s case was of a purely preliminary and preparatory nature and that the *Carltona* principle was not engaged at that juncture, as they were not exercising, in the words of Cooke J. in *O.O.* ([2011] IEHC 175) “*the actual discharge of the Minister’s statutory function of making a deportation order.*” It is of course the case that the *Carltona* principle applied to Ms. Lee *qua* her role as subsidiary protection decision-maker. However, the *decision* in relation to the deportation of F.M. was not made until the designated decision-maker, Mr. Waters (to whom as the person charged with the Minister’s decision-making function the *Carltona* principle obviously applied) made his decision on 27 September 2012, which was some three weeks after the subsidiary decision was made by Ms. Lee as the designated decision-maker for that application.

**68.** Similarly, the work done by Ms. Kerr and Ms. Ní Fheinneadha on S.O.U.’s leave to remain application was routine, being of a preliminary and preparatory nature, and not in the exercise of any statutory power. Thus, the *Carltona* principle was not engaged. This applies also to the input of Mr. Flynn who agreed on 21 January 2011 with Ms. Ní Fheinneadha’s recommendation that S.O.U. be deported. No *decision* was taken regarding

her deportation until 26 January 2011 when the Minister (the decision-maker) made her decision. The decision refusing S.O.U. subsidiary protection application was taken some five days previously on 21 January 2011 by Mr. Flynn (to whom the *Carltona* principle obviously applied).

**69.** I consider it instructive that in *WT v. Minister for Justice*, McMenamin J. noted that the *Carltona* doctrine applies to “*functions entrusted to departmental officials...performed at an appropriate level of seniority, and within the scope of responsibility of their government department.*” (emphasis added) This chimes with the words of Greene L.J. in the *Carltona* case itself. Without wishing in any way to disrespect the work done by the Executive Officers in the present cases, it is however noteworthy that the decision-making function (whether it be for the purposes of subsidiary protection or deportation), insofar as it was delegated by the Minister, was not entrusted to officials at Executive Officer level.

**70.** In all the circumstances, I am satisfied that the *Carltona* principle was not engaged in these cases in the sense contended for by the appellants.

**71.** I turn now to what is said by the appellants to give rise to prejudgment in respect of their subsidiary protection applications.

**72.** With regard to F.M., counsel asserts that the factual matrix in the case demonstrates that the Executive Officer, Ms. Clarke, recommended that he be deported from the State prior to the determination by Ms. Lee of his application for subsidiary protection. Counsel states that the report recommending F.M.’s deportation, which Ms. Lee received from Ms. Clarke on the same day she received her recommendation that F.M. not be granted subsidiary protection, clearly presupposed that F.M. would not be found eligible for subsidiary protection.

**73.** Counsel says that there is an equally obvious and clear basis for reasonable apprehension of prejudgment in regard to S.O.U. in circumstances where Ms. Kerr

recommended that S.O.U. be deported from the State (as approved by Ms. Ní Fheinneadha) and which was transmitted to Mr. Flynn prior to a final determination being made by him on the subsidiary protection application. It is argued that the recommendation to deport clearly presupposed that S.O.U. would not be eligible for subsidiary protection. Counsel points to the fact that on the same day (21 January 2011) as he refused S.O.U. subsidiary protection, Mr. Flynn gave his approval to the recommendation to deport S.O.U.

**74.** The Minister denies that there is any valid basis upon which it can be said that either Ms. Clarke's actions in preparing the report of 24 July 2012 in relation to the deportation recommendation in respect of F.M., or Ms. Kerr's actions in preparing a similar report on 19 January 2011 with regard to S.O.U., can give rise to a reasonable apprehension of prejudgment of F.M.'s and S.O.U.'s subsidiary applications. It is submitted that Ms. Clarke's and Ms. Kerr's respective reports recommending deportation were advisory documents only which would have been rendered redundant if, in the case of F.M., Ms. Lee had decided that he should be granted subsidiary protection and, in the case of S.O.U., Mr. Flynn had decided likewise.

**75.** Counsel for the Minister submits that the crucial consideration in respect of the bias and prejudgment claim is that the respective subsidiary protection applications were considered at different levels within the system and in the context where, in the case of F.M., Ms. Lee, the Higher Executive Officer charged with deciding on the subsidiary protection application, was not bound by the views of Ms. Clarke, who made the initial recommendations in both the subsidiary protection and leave to remain applications. That also applies in the case of S.O.U. where Mr. Flynn, the subsidiary protection decision-maker in S.O.U.'s case, was not bound by the initial recommendations made by Ms. Kerr in either application, or the approval thereto as given by Ms. Ní Fheinneadha.

**76.** The Minister asserts that it must be presumed that the officials concerned approached matters correctly and in the correct sequence and that it cannot be said or presumed that the ultimate decision-makers on the respective subsidiary protection applications (Ms. Lee and Mr. Flynn) would have acted otherwise.

**77.** Counsel for the Minister submits that similar arguments to those of the appellants were rejected by Cooke J. in *O.O. v. Minister for Justice* [2011] IEHC 165 and *O.O. v. Minister for Justice* [2011] IEHC 175 upon which the Minister relies.

**78.** The appellants' core contention is that the position in which they found themselves was that before their subsidiary protection applications were determined, all the documentary steps regarding their proposed deportation from the State had been put in place, the consequence of which would suggest, to the objective onlooker, a negative outcome for their undetermined subsidiary protection applications. They emphasise that although something may not amount to the appearance of prejudgment in a decision-making process not impacting on fundamental rights, this is not such a case. The same circumstances may well amount to objective bias where the decision is one that concerns fundamental rights such as in this case and where what was in issue was their absolute right to be free from torture or inhuman or degrading treatment or punishment. It is argued that the protection of such rights requires, in any decision-making process, a high degree of natural/constitutional justice being afforded to the appellants, consistent with the *dictum* of Bingham L.J. in *Secretary of State for the Home Department v. Thirukumar & Ors* (1999) Imm AR (at p. 414).

**79.** The question, as put by counsel for the appellants, is whether a reasonable and fair-minded person sitting in the Minister's Department and seeing officials being directed to expend public resources by working on a preparatory deportation decision whilst the draft subsidiary protection reports, also prepared by the same officials, were waiting to be

approved and determined would likely have a reasonable apprehension that a fair determination on the subsidiary protection application was not possible. In other words, does the fact that the deportation order process was commenced in each case, and the relevant recommendation drafted prior to a valid subsidiary-protection decision being made, give rise to an apprehension of bias? The process adopted, counsel submits, is analogous to an employer in an alleged employee misconduct case preparing a draft disciplinary report prior to the conclusion of an investigation into the employee's misconduct.

**80.** The law in respect of bias in this jurisdiction is well settled. It is as set out by Denham J. in *Bula v. Tara (No.6)* [2000] 4 I.R. 408. In *Bula*, the applicants appealed to the Supreme Court against the judgment and order of the High Court. The appeal was dismissed. Subsequently, the applicants applied to have the judgment of the Supreme Court set aside on the ground of objective bias on the part of two members of the court on the basis that both judges had prior links with the respondent. Having analysed a number of authorities, Denham J. held, at p. 439 as follows:

*"... there is well settled law that the test is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not receive a fair trial of the issues."*

At p. 441, she elaborated further, stating:

*"However, there is no need to go further than this jurisdiction where it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issue. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the*

*apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."*

**81.** The approach of Denham J. was applied by the Supreme Court in *O'Ceallaigh v. An Bord Altranais & Ors* [2011] IESC 50.

**82.** The same bias claim as maintained here was considered by Cooke J. in *O.O. v. Minister for Justice and Equality* [2011] IEHC 175. He stated:

*"15. In the present application for leave to appeal the applicants place considerable emphasis on the importance of the issue as to the order in which the subsidiary protection and deportation decisions must be taken. It is submitted that an applicant for subsidiary protection is entitled to "fair procedures" and that it is essential therefore that the decision be taken by a disinterested decision maker and that there be no possibility of an appearance of bias. It is argued that if the work of preparing the ground for the deportation decision is already underway before the subsidiary protection determination has been made, an appearance of bias and prejudgment is necessarily created. No problem, however, arises as regards the order in which the decision must be taken. Regulation 4(5) clearly requires that the subsidiary protection determination be made first. The only question raised here is whether the expression "proceed to consider" is a direction that the Minister shall next decide the deportation issue or whether it is equivalent to "shall only then begin to think about" making a deportation order.*

*16. As the court has already pointed out in its judgment, it does not consider that this question gives rise to any great difficulty much less to any important point of law of public interest. The argument relies, in effect, on a wholly exaggerated view of the significance of the work embodied in the collation of information from the available files; the preparation of a summary of what is relevant under the various*

*statutory headings and the formulation of drafts for a possible recommendation to be made to the Minister for his consideration. The work done at the outset by an Executive Officer carries no weight or authority until it has been read, revised and approved by several superior levels in the hierarchy of the repatriation unit and acquires no status whatsoever as a decision until it is ultimately considered, accepted and acted upon by the Minister...*”

**83.** The approach of Cooke J. was described by Hogan J. in *F.L. v. Minister for Justice* [2012] IEHC 189 (paras. 16-17) as “*unexceptional*” although it was not directly material to the point at issue in that case.

**84.** In *N.D.(Nigeria)*, where again it was being alleged that there was an infringement of Regulation 4(5) because of prejudice, Cooke J. again rejected that claim stating:

*“43... 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 prejudice 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.”*

**85.** At paras 11-12 of Mr. King’s affidavit on behalf of the Minister in the F.M. case, he avers as follows:

“Having considered the report and recommendation of the 23<sup>rd</sup> July 2012 and the Applicant’s file, Ms. Lee made a determination on the 31<sup>st</sup> August 2012 that the Applicant was not eligible for subsidiary protection and recorded this determination by signing and dating the report.

Having made the said determination in respect of the subsidiary protection application, Ms. Lee then considered the report of the 24<sup>th</sup> July 2012 which recommended that a deportation order should be made. Having considered same, she approved the recommendation and recorded this in writing on the report.”

**86.** Counsel for the appellants submits that those averments are hearsay as Mr. King had no involvement in the subsidiary protection or deportation decision-making process. Accordingly, counsel contends that there is no admissible affidavit evidence from the Minister on the issue of the order in which Ms. Lee considered each decision. It is argued that in such circumstances, F.M. cannot be sure, on the face of the two decision documents, that Ms. Lee decided the subsidiary protection application prior to turning to the deportation-order document. If she concluded her work on both simultaneously, there is the appearance of prejudgment. It is submitted that in all of the circumstances here, a reasonable observer would have a reasonable apprehension that Ms. Lee, who was the final decision maker in F.M.’s subsidiary protection application, may have prejudged the refusal of subsidiary protection.

**87.** It is also submitted that the affidavit sworn by Mr. Tony Dalton, Higher Executive Officer, on behalf of the Minister in S.O.U.’s proceedings, sheds no light on the question

of the order in which Mr. Flynn approved the respective subsidiary protection and deportation documents, or on whether they were both read before he signed whichever one he signed first. Accordingly, counsel says that S.O.U. cannot be sure from the face of the two decision documents that Mr. Flynn decided the subsidiary protection application prior to turning his attention to the proposed recommendation to deport.

**88.** Counsel for the Minister characterises the appellants' objection to Mr. King's affidavit in the F.M. proceedings as highly technical and futile. The Minister points out that the statement of opposition, which Mr. King verified, stated that the procedures adopted in F.M.'s case were the same as those used in other cases. It is submitted that even if Mr. King's affidavit were to be disregarded, the result would be that there would be no direct evidence as to the order in which Ms. Lee considered or signed the two reports dated 23 and 24 July 2012 respectively.

***Can it be said that pre-judgment or bias arose?***

**89.** With regard to the allegation of pre-judgment being made in these cases, to my mind, the first principle to be applied is that absent evidence to the contrary, it must be presumed that the Minister would decide on the appellants' respective subsidiary protection applications lawfully (see *East Donegal Co-operative Livestock Mart v. Attorney General* [1971] I.R. 317, *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* [2016] IEHC 300 and *RC (Afghanistan) v. Minister for Justice* [2019] IEHC 65). The Minister submits that the maxim *omnia praesumuntur rite et solemniter esse acte* applies and that the Court must thus presume that the proper procedures were followed. I accept that the maxim is applicable to the processes in issue in these cases.

**90.** Neither appellant contends that the initial Executive Officer who prepared the deportation report in their cases did so before she prepared the subsidiary protection report. Nor do they object to the fact that the same personnel were involved in the subsidiary

protection and deportation decisions: the objection relates in effect to an issue as to sequencing.

**91.** With regard to the timing or sequencing issue, to my mind, in the absence of actual evidence to the contrary, the only logical inference that can be drawn is that Ms. Lee, in the case of F.M., and Mr Flynn, in the case of S.O.U., determined the subsidiary protection applications before they went on to approve the respective reports that recommended deportation. It must be borne in mind that they were the officers responsible for deciding the subsidiary protection applications. As a matter of logic, they could not have gone on to recommend deportation unless they were satisfied that the appellants were not entitled to subsidiary protection. While I note the complaint which counsel for the appellants makes in respect of the contents of Mr. King's affidavit, the fact of the matter is that the appellants, on whom the onus of establishing bias rests, have not put forward any evidence to suggest that the subsidiary protection applications were not determined first in time.

**92.** Although it is true that in F.M.'s case, Ms. Clarke, Executive Officer, had a preliminary view on the subsidiary protection application and that she had also forwarded to Ms. Lee her preparatory work and recommendation on the leave to remain application, Ms. Lee as the designated decision-maker in the subsidiary protection matter remained entirely free, and indeed obliged *qua* her role as designated decision-maker, to make her own judgment on the subsidiary protection application and to decide differently to what Ms. Clarke recommended. The same can be said of Mr. Flynn, the subsidiary protection decision-maker in S.O.U.'s case, albeit he too had received a report and recommendation against granting subsidiary protection application from Ms. Kerr as annotated Ms. Ní Fheinneadha and was also in receipt of a recommendation in favour of deportation.

**93.** Furthermore, neither Ms. Lee nor Mr. Flynn was the designated decision-maker in respect of the leave to remain applications. The relevant decision-makers in the deportation process were Mr. Waters, in the case of F.M., and the Minister, in the case of S.O.U.

**94.** Further relevant considerations arise, in my view. First, the provisions of Regulation 4(5) itself engages with the concept of deportation. Secondly, it is fair to say that by the time it fell to the Minister (or her nominated delegates) to consider the subsidiary protection applications in issue here, the Minister had already advised the appellants of her intention to deport them (following the refusal of refugee status), as is clear from the contents of the three-options letter sent to each of the appellants. The possibility of whether the fact that the three-options letter (routinely used by the Minister) contained a proposal to deport a protection applicant before any application for subsidiary protection was made or considered gave rise to bias or pre-judgment arose for consideration by the CJEU in Case C 604/12, *H.N. v. Minister for Justice and Equality* (8 May 2014) following a preliminary reference by the Supreme Court.

**95.** The factual backdrop to the *H.N.* case was as follows. In 2009, Mr. N., a Pakistani national, applied for subsidiary protection in this jurisdiction without first having made an application for refugee status. He was informed that it was not possible to consider his application as under Irish law the basis for making an application for subsidiary protection status was that the person applying had been refused refugee status. Mr. N sought judicial review of the Minister's decision, arguing that the Qualifications Directive gave him the right to make an autonomous application for subsidiary protection. After judicial review was refused, he appealed to the Supreme Court. That court stayed the proceedings and referred the following question to the CJEU:

*“Does...[the Qualifications Directive] ..., interpreted in the light of the principle of good administration in the law of the European Union and, in particular, as*

*provided by Article 41 of the Charter ..., permit a Member State to provide in its law that an application for subsidiary protection status can be considered only if the applicant has applied for and been refused refugee status in accordance with national law?"*

**96.** The CJEU held that it was permissible for the State to apply the two-stage (bifurcated) procedure under which applications for subsidiary protection would be considered only after the determination of applications for refugee status. This was subject to the qualification however that a person should be allowed to apply for each form of protection at the same time albeit that the asylum application would be considered first. Specifically, the CJEU rejected any contention that the bifurcated system undermined the objective impartiality of the procedure:

*"52. As regards, in particular, the requirement for impartiality, that requirement encompasses, inter alia, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the national authorities concerned (see, by analogy, Case C-439/11 P Ziegler v Commission EU:C:2013:513, paragraph 155).*

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

*54. It is in fact common ground that the reason for that disclosure on the part of the competent authorities is that it has been found that the third country national does not qualify for refugee status. That finding does not, therefore, mean that the*

*competent authorities have already adopted a position on whether that third country national satisfies the requirements for being granted subsidiary protection.*

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

**97.** The Minister relies on *H.N.* as support for her argument that no question of bias or pre-judgment arises in respect of the subsidiary protection decisions in issue in these cases.

**98.** It is clear that in *H.N.* (although it is, perhaps, not on all fours with the specific arguments the appellants make here) the CJEU did not consider that the fact that the Minister in the three-options letter had proposed making a deportation order (because the person had been unsuccessful in claiming asylum) meant that she had adopted any position on the person’s entitlement to subsidiary protection.

**99.** The ruling of the CJEU in *H.N.* was applied by the Supreme Court in its judgment in the same case (cited as *Nawaz v. Minister for Justice* [2015] IESC 30) and was applied in *V.J. v. Minister for Justice and Equality* [2019] IESC 75. *V.J.* was, in turn, applied by this Court in *F.M. and others v. Minister for Justice and Equality* [2020] IECA 184.

**100.** As observed by O’Donnell J. in *V.J.*,

*“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.”*

**101.** Applying the reasoning set out by the CJEU in *H.N.*, to my mind, the fact that a report was created in each of the present cases examining whether or not the appellants qualified for permission to remain in the State prior to the determination of the subsidiary protection applications does not lead inexorably to the conclusion that a position had been adopted either by Ms. Lee (the decision-maker in F.M.'s case) or Mr. Flynn (the decision-maker in S.O.U.'s case) that the appellants were not eligible for subsidiary protection. It is noteworthy that in *H.N.*, the CJEU did not consider the "proposal" to deport made under the hand of the Minister (even before subsidiary protection would be considered) as indicative of bias provided that there was "*sufficient guarantees to exclude any logistical doubt as to bias on the part of the national authorities.*"

**102.** As far as the within cases are concerned, I am satisfied that the spectre of "*logistical doubt*" is negated by the following factors: (i) Neither Ms. Lee nor Mr. Flynn, the respective subsidiary protection decision-makers, were bound in any way by the opinions or recommendations expressed by the officials who prepared preparatory reports in respect the subsidiary protection application; (ii) while prior to making their subsidiary protection decisions Ms. Lee and Mr. Flynn were the recipients of reports from the same officials recommending deportation, neither Ms. Lee nor Mr. Flynn were the decision-makers in the s.3 process; (iii), while undoubtedly both Ms. Lee and Mr. Flynn had a role in approving the deportation recommendations of the Executive Officers, as a matter of logic their role in this regard could not have come into play until they made their decisions on the subsidiary protection applications.

**103.** The appellants, who bear the onus of proving the facts upon which they rely to construct a claim of bias or prejudice, in my view, have not advanced any persuasive evidence or argument that the procedures adopted in the consideration of their subsidiary protection applications gave rise to objective bias. I do not find that the test for objective

bias as pronounced by Denham J. in *Bula* is made out here. To borrow from what McGuinness J. said in *Bula*, the appellants' apprehension "*should be both reasonable and realistic*". It seems to me that in these cases, the reasonable person having reasonable knowledge of the relevant facts would know that with regard to the subsidiary protection and deportation processes, there were two decision-makers at play both of whom were independent of each other. Similarly, the reasonable person would appreciate and commence their appraisal of the processes on the basis that if the sequencing of the making of the *decision-making* has been ordained by statute that is the sequence in which the *decision-making* will occur.

**104.** While, as is by now clear, it is the case that the officials who were engaged in initial preparatory work in respect of the subsidiary protection applications were also charged with preparatory work in respect of the leave to remain applications and while these were forwarded to their superiors (who were the decision-makers in the subsidiary protection applications), for the reasons I have outlined, that of itself does not amount to objective bias. It must, I believe, be acknowledged that the Minister is entitled to arrange the administration of her department with regard to how its work is to be as she considers appropriate.

**105.** It must also be recalled that the matters considered in the subsidiary protection reports and the s.3 reports were quite different. The claims made by the appellants in their respective subsidiary protection applications required a consideration of issues relating to their credibility as considered by the RAT, country of origin information and the application of the provisions of the 2006 Regulations. By contrast, the reports prepared pursuant to s.3 of the 1999 Act in relation to the leave to remain applications involved a consideration of whether or not there was any other basis upon which the appellants should be granted permission to remain in the State, assuming they were not entitled to protection

in the State. The s.3 reports were concerned with the exercise of the Minister's discretion (taking into account the factors set out in s.3(6), issues of refoulement and ECHR considerations) to grant permission to remain, and not with any issue of entitlement to remain arising from a protection need. Thus, the appellants' argument that consideration of discretionary permission to remain by the Minister's officers indicated prejudgment on the part of the subsidiary protection decision-makers of their subsidiary protection applications is not made out, to my mind.

**106.** It is also worth noting that any official in the Minister's Department who had read an applicant's file for the purposes of considering his or her eligibility for subsidiary protection would be well placed (if subsidiary protection is to be refused) to analyse when reviewing an application for leave to remain whether there were grounds on which the applicant might be granted permission to remain in the State on a discretionary basis. This seems to me consistent with the concept of good administration. If it transpired that the preparatory work done on a leave to remain application was ultimately rendered redundant because subsidiary protection status was later granted, so be it.

**107.** Counsel for the Minister also argued that if the appellants' bias arguments in these cases were to be accepted it would imply that the procedures under the 2015 Act were invalid because, on the appellants' arguments, they would give rise to an apprehension of bias. This is because, under the 2015 Act, apparently, the personnel who consider the application for protection also consider issues relevant to the granting of permission to remain before a final decision is made as to the grant of protection status.

**108.** Pursuant to the 2015 Act where the recommendation under s.39 is that a person should not be granted protection, the Minister must then consider whether the person should be granted permission to remain. Section 49(2)(b) of the 2015 Act requires the Minister when considering a leave to remain application to have regard to information

submitted by the applicant during the protection application. Furthermore, the Minister is required to make a decision as to whether or not to grant permission to remain whether or not the applicant appeals the refusal of protection to IPAT. In the present cases, the Minister submits that this process merely serves to emphasise that the grant of discretionary permission to remain is entirely independent of the assessment of the eligibility of a person to protection status.

**109.** The procedures now in place pursuant to the 2015 Act are in no way determinative as to whether bias or pre-judgment arose in the present cases, so I do not consider them to be of any relevance in these cases. However, I note, in passing, that in *I.X. v. Chief International Protection Officer* [2020] IESC 44, O'Donnell J. opined that the 2015 Act “effected a radical, and welcome restructuring the process for decision-making on applications for asylum, subsidiary protection, and leave to remain and other related issues.” (at para. 59)

***Reliance on R. v. Romsey Justices Ex parte Gale and Green***

**110.** Part of the argument made by counsel for the appellants was that the factual matrixes pertaining to the decision-making processes in the case of F.M. and S.O.U. were analogous to that in *R. v. Romsey Justices Ex parte Gale and Green* [1992] 156 JP 567, [1992] Crims LR 451. In that case two people who had been convicted of criminal offences before the *Romsey Justices* (who sat as a bench of three) challenged their convictions by way of judicial review. It transpired that on the eve of the last day of the trial, one of the three justices had typed out a note of what he proposed to say at the conclusion of the case the following day in the event that he and his colleagues would come to the conclusion that the prosecution case had been made out. The judge who had made the note carried it with him to court the following day and kept it to himself until the whole of the proceedings was concluded by, after discussion, he and his two colleagues coming to the conclusion

that on the evidence the applicants were guilty as charged. They then proceeded to fine those convicted and order them to pay some costs. When the matter was finally concluded the judge in question handed his prepared note down to the clerk of the court for the day by way of assistance in the making of the record of the proceedings.

**111.** In the judicial review proceedings which ensued, the UK High Court held while there was no suggestion of actual bias, the only possible conclusion was that a reasonable and fair-minded person sitting in court and knowing all the relevant facts would likely have a reasonable suspicion that a fair trial for the applicants was not possible. This was despite the fact that the note had not been prepared by the actual decision maker (which was in law the three justices acting together).

**112.** Counsel for the Minister asserts that the appellants' reliance on *Romsey* is misplaced in circumstances where in that case the court had a factual basis upon which to adjudicate on objective bias, namely the note documenting guilt which had been created a day prior to the adjudication of guilt.

**113.** I agree with the Minister's submission that reliance on *R. v. Romsey Justices* does not assist the appellants in discharging the onus that is on them to establish objective bias. The action which gave rise to the objective bias in that case concerned one of the trio of justices who comprised the decision-maker in the case, in other words while the action could not be said to be that of the tribunal itself, the action was nevertheless so closely connected with the decision-making body as to give rise to a reasonable apprehension of bias. Here, the situation was entirely different, concerning as it did work carried out by officials who were not charged with the decision-making functions in issue in the within appeals.

**(iii) Procedural legitimate expectation**

**114.** The appellants contend that given that deportation matters were considered prior to their subsidiary protection applications having been determined the “procedural legitimate expectation” which they had from the contents of the three-options letters sent to them was breached. As support for this argument the appellants rely on the positive averment in the three-options letters that their subsidiary protection applications would be determined before any consideration turned to the question of deportation.

**115.** Counsel for the Minister raises a procedural objection to this argument being raised on behalf of F.M. and asserts that his proceedings did not allege breach of a legitimate expectation in the context of the subsidiary protection application. He did so only in the context of his deportation challenge. Counsel also says that the legitimate expectation argument in S.O.U.’s pleadings was not pressed in the High Court in submissions, or in the notice of appeal, albeit it is accepted that an alleged breach of legitimate expectation is set out in at ground (e)(viii) of the statement of grounds.

**116.** In any event, the Minister denies that the appellants could have had any legitimate expectation that the Minister would refrain from any preparatory work in relation to the issue of deportation prior to making a determination on the applications for subsidiary protection. It is further submitted that as a matter of fact the Minister acted in accordance with the terms of the three-options letter furnished to the appellants.

**117.** I do not propose to address the procedural frailties which the Minister ascribes to the appellants’ procedural legitimate expectation arguments, being satisfied to dispose of the procedural expectation claim on its merits.

**118.** The relevant part of the three-options letter sent to the appellants set out the order in which their “case” would be “decided”. The wording in the letter is clear, namely that the *decision* in relation to permission to remain or deportation would only be made after an adverse decision on the subsidiary protection application. The Minister did as she said she

would do: in each case, she *decided* the subsidiary protection first, and thereafter made a decision on the leave to remain application, i.e. she decided the relevant matters in the same sequence as set out in the respective letters. For the reasons I have earlier set out, I am of the view the three-options letters sent to the appellants cannot reasonably be interpreted as an assurance that no civil servant would give consideration to the merits of the representations seeking leave to remain until after a decision had been made on the subsidiary protection application.

**Alleged mootness of S.O.U.'s appeal**

**119.** In her submissions, the Minister argued that S.O.U.'s proceedings were moot given that she was deported in 2015. I did not, however, consider that argument sustainable since albeit she was deported, the very fact of her deportation could not, in my view, render S.O.U.'s challenge to the subsidiary protection decision moot.

**Summary**

**120.** For the reasons set out in the judgment, I would dismiss the appeals.

**121.** The appellants have not succeeded in these appeals. Accordingly, it follows that the Minister should be entitled to her costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

**122.** As this judgment is being delivered electronically, Donnelly J. and Binchy J. have indicated their agreement therewith and the order I propose.

