Neutral Citation Number: [2007] IEHC 277

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 1394 JR]

BETWEEN

N.H.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND

THE HIGH COURT

JUDICIAL REVIEW

[2007 No. 68 JR]

BETWEEN

T.D.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Feeney delivered on the 27th day of July, 2007

In both the above cases the Applicants seek orders quashing the refusal by the Respondent to consider applications for subsidiary protection made by both of them and requiring the Respondent to process and determine the said applications.

In each case the Applicant is a person who has been refused a declaration of refugee status and also, has been refused leave to remain in the State and both Applicants are the subject of a lawful deportation order.

The Applicant N.H. arrived in Ireland in August, 2004 and applied for refugee status. He is a national of his country of origin, who was born on the 24th November, 1963. Mr. H. is of homosexual orientation and claimed that he suffered persecution as a result of his sexuality throughout his adult life in his country of origin and was subject to numerous assaults. Mr. H. claimed that the police in his country of origin both failed and/or refused

to assist him and that if he is returned to his country of origin that he will face a real risk to his life or would be at risk of serious harm. Mr. H. pursued an application for refugee status and the Refugee Applications Commissioner recommended that he should not be declared a refugee. That recommendation was appealed to the Refugee Appeals Tribunal and following an oral hearing it was determined that Mr. H. was not a refugee and had not established a well founded fear of persecution and the recommendation of the Refugee Applications Commissioner was affirmed. That decision was contained in a written decision of the 9th May, 2005. Mr. H. was informed of that decision by letter dated 13th May, 2005. By letter dated 16th September, 2005 a solicitor from the Refugee Legal Service acting on behalf of Mr. H. submitted an application pursuant to s. 3 of the Immigration Act, 1999, seeking leave to remain in the State. It was expressly submitted that the return of Mr. H. to his country of origin would submit him to a breach of his fundamental human rights and in particular Article 5 of the European Convention on Human Rights and it was requested that the Minister should exercise his discretion in respect of Mr. H. and grant him leave to remain in the State. On the 12th July, 2006 the Minister for Justice, Equality and Law Reform made a deportation order in respect of Mr. H. and he was informed of the making of such order by letter dated the 27th July, 2006. In that letter the Minister determined that having regard to the factors set out in s. 3(6) of the Immigration Act, 1999, including the representations made on Mr. H.'s behalf that the Minister was satisfied that the interest of public policy and the common good in maintaining the integrity of the asylum and immigration system outweighed such features of his case as might tend to support him being granted leave to remain in the State. The Minister was also obliged prior to making such order to have regard to s. 5 of the Refugee Act 1996 in relation to prohibition of refoulement.

By letter dated the 11th November, 2006 solicitors acting for Mr. H. applied to the Respondents for subsidiary protection under the European Communities (Eligibility for Protection) Regulations S.I. No. 518/2006 (The Regulations). The basis of such application was that the Applicant was claiming serious harm based upon torture or inhuman or degrading treatment or punishment of the Applicant in the country of origin and the application was accompanied by a number of "country of origin" documents. The letter enclosing the application for subsidiary protection was responded to by letter of the 22nd November, 2006 from the Department of Justice, Equality and Law Reform, wherein it was stated that the effect of the provisions of the 2006 Regulations S.I. 518/2006 was that the Regulations were not applicable in cases where a deportation order had been made by the Minister for Justice, Equality and Law Reform before the coming into operation of those Regulations on 10th October, 2006. It was stated that those Regulations are operative from the 10th October, 2006 and do not operate retrospectively and that in Mr. H.'s case since the deportation order was signed by the Minister on the 12th July, 2006 and was notified to him by registered letter dated 27th July, 2006 that the Assistant Principal Officer in the Reparation Unit had concluded that the provisions of the European Communities (Eligibility for Protection) Regulations 2006, did not apply to Mr. H. and that the Assistant Principal Officer therefore made a decision on behalf of the Minister that the application under the Regulations is invalid and must be refused. It is the decision made on behalf of the Minister to refuse to process Mr. H.'s claim for subsidiary protection which is the subject matter of his judicial review.

T.D. was born on the 20th January, 1945 and arrived in Ireland at the end of June, 1999. Ms. D. came from her country of origin and she claimed that she left that country because her life was endangered due to her daughter's involvement with a student political group. Ms. D. was interviewed in relation to her application for refugee status on the 4th September, 2001 and a report was duly made on the 5th October, 2001 to the effect that Ms. D. had not established a case to qualify for refugee status and that a recommendation to that effect should be made. On the 10th October, 2001 the Refugee Applications Commissioner determined that she was satisfied that the Applicant had failed to establish a case to qualify her for refugee status and it was recommended that she should not be declared a refugee. That recommendation was appealed to the

Refugee Appeals Tribunal and following an oral hearing on the 11th September, 2002 a member of the Refugee Appeals Tribunal decided in a report dated the 18th November, 2002 that the Applicant had failed to establish a well founded fear of persecution for a convention reason in accordance with s. 2 of the Refugee Act, 1996 (as amended) and that accordingly Ms. D.'s appeal was dismissed and the recommendation of the Refugee Applications Commissioner was affirmed.

By letter dated the 25th February, 2003 Ms. D. was informed of the intention of the Minister to make a deportation order pursuant to the powers given to him under s. 3 of the Immigration Act, 1999 and that in accordance with s. 3 of the Immigration Act, 1999 Ms. D. was entitled to make written representations to the Minister setting out any reasons why she should be allowed to remain within the State and indicating that if she wished to avail of the opportunity to make such representations that she must do so within a period of fifteen days. Written representations were duly made by letter dated the 4th March, 2003 from the solicitors acting for Ms. D. The grounds relied upon related to family unity, Ms. D.'s health and the length of her residency within the State and the absence of a family home in the Ivory Coast.

On the 26th August, 2004 the Minister made a deportation order in respect of Ms. D. Ms. D. was informed of that deportation order by letter of 27th January, 2005 wherein it was indicated that having had regard to the factors set out in s. 3(6) of the Immigration Act, 1999 including the representations received on Ms. Djolo's behalf that the Minister was satisfied that the interest of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweighed such features of her case as might tend to support her being granted leave to remain in the State. Prior to making such decision the Minister had to have regard to s. 5 of the Refugee Act 1996.

By letter of the 9th November, 2006 the solicitor's then acting for Ms. D. made a detailed application for subsidiary protection pursuant to Council Directive 2004/83/EC and completed the form attached, as Schedule 1 to Regulation 518/2006. The letter had attached a number of documents detailing "country of origin information". Those documents included a US Department of State Report of 2005, a UNHCR update of October, 2006 and a Human Rights Watch Report of May, 2006. The application for subsidiary protection under the European Community Regulations was made expressly pursuant to the Regulations and was on the basis that Ms. D. was at risk of serious harm due to the serious and individual threat to a civilian's life or person in her country of origin by reason of indiscriminate violence in situations of international or internal armed conflict. The letter of the 9th of November, 2006 also enclosed documentation relating to Ms. D.'s medical condition. By letter dated the 1st December, 2006 Ms. D. received a response from the Assistant Principal Officer in the Reparation Unit of the Department of Justice, Equality and Law Reform in identical terms to the response received by Mr. H. stating that the provisions of the European Communities (Eligibility for Protection) Regulations 2006, did not apply to Ms. D. and that the Assistant Principal Officer had therefore made a decision on behalf of the Minister that her application under the Regulations was invalid and must be refused.

In both cases the Applicants are persons who have been refused a declaration of refugee status and have also been refused humanitarian leave to remain in the State and are subject to deportation orders made prior to the 10th October, 2006. The Applicants in these judicial review proceedings seek relief arising out of the coming into effect of Council Directive 2004/83/EC of 29th April, 2004 (the Directive). The Directive was implemented into Irish law by the European Communities (Eligibility for Protection) Regulations 2006, (S.I. No. 518/2006) (the Regulations). In both cases the Respondent has refused to consider applications for subsidiary protection under the Regulations. Each Applicant has sought an order of certiorari quashing these decisions of the

Respondent. Each Applicant has also sought an order of mandamus directing the Respondent to accept and process their application.

In both cases the Respondents have claimed, in the opposition papers filed on behalf of the Minister, that the Regulations have no application to the particular Applicants as both of them were persons in respect of whom a deportation order was issued prior to the coming into force of the Regulations on the 10th October, 2006 and that there is no obligation on the State under the Directive to re-open or reconsider decisions made prior to the 10th October, 2006. Further it is contended that, in any event, in considering both the Applicants cases prior to the making of the deportation orders that the authorities necessarily considered whether there was a risk that such Applicant would be exposed to serious harm if returned to their home State.

An issue between the parties in these cases relates to whether or not the Directive created a right to apply for subsidiary protection, as contended for by the Applicants, rather than doing nothing more nor less than laying down minimum standards to be applied under existing procedures, as contended for by the Respondents. It is also the Respondent's case that the authorities in this State necessarily considered whether there was a risk to the Applicants when the Minister considered each of the Applicants written submissions seeking to remain and also considered the issue of refoulement.

It is contended on behalf of the Respondent that it was not the purpose of the Directive to impose new protection obligations on Member States and that the Directive was proposed in the interest of harmonisation of the rules of the Member States. The Respondent also contends that what is now set down as the grounds entitling a person to subsidiary protection were in practice taken into account prior to the making of the deportation orders. Later in the Respondent's submissions it is contended (para. 7.5) that

> "Insofar as the Applicants contend that fresh facts and circumstances could arise between the refusal of an application for asylum and/or the making of a deportation order and the making of an application for subsidiary protection, it is submitted that it is inconceivable that the majority (or even a substantial minority) of the Applicants would rest their claims on fresh facts and circumstances. The Respondent's position is that any danger in this regard can be met by the making of an application pursuant to s. 17(7), … the making of such an application has the advantage that it can be considered on a case by case basis, as and when required, without the risks of large numbers of failed asylum seekers either remaining in the State in breach of a deportation order, or even re-entering the State in defiance of such an order."

The concept of complementary protection or subsidiary protection has long been recognised both internationally and in this country. This recognition stems from the fact that the laws and regulations applicable to the regulation of the movement of refugees are such that not all persons seeking protection fit neatly within legal definitions. The concept of complementary protection or subsidiary protection has allowed persons who are not technically refugees, but who nevertheless have a real need for protection, to remain within a State. The extent of such complementary protection, varied widely within the EU countries, extending from non-refoulement on the one hand to legal authorisation with access to defined benefits on the other hand.

The position in Ireland prior to the Directive was that persons who had been refused refugee status could avail of s. 3 of the Immigration Act 1999. That section at subs. 3(a) allowed that persons who had failed in their application for refugee status and who had been notified of a proposal to make a deportation order could within fifteen days send representations in writing to the Minister. Section 3(6) of the Immigration Act 1999

identified the matters which the Minister shall have regard to in determining whether to make a deportation order. The procedure was also subject to the provisions of s. 5 (prohibition of refoulement) of the Refugee Act 1996. Such applications were often referred to as humanitarian leave to remain. The nature of such applications was considered by Hardiman J. in the Supreme Court in *P. and L. v. The Minister for Justice, Equality and Law Reform* and *B. v. Minister for Justice, Equality and Law Reform and the Attorney General* in a judgment delivered on the 30th July, 2001, where he stated (at p. 12) commenting on the Applicants in those cases who had made representations pursuant to s. 3(3) of the Immigration Act 1999 in the following terms, namely:

> "They were persons whose applications for asylum had been rejected at first instance and on appeal. They lacked any entitlement to remain in the country save that deriving from the procedures they were operating i.e. a right to await a decision on a request not to be deported. Both the fact that they had been refused refugee status, and the nature of the decision awaited as it appears from the Act, emphasise that this was in the nature of an *ad misericordiam* application. The matters requiring to be considered were the personal circumstances of the Applicant, described under seven subheadings: his representations (which in practice related to the same matters) and "humanitarian considerations"."

If a person succeeded in his representations and the Minister determined to amend, revoke or delay the deportation order such person did not obtain any defined benefits.

An application for leave to remain under s. 3 of the Immigration Act 1999 and the *ad misericordiam* or ad hoc nature of same is demonstrated by a number of factors. Firstly, if an Applicant were to succeed in such application it would be in the Minister's discretion as to what relief would be granted. The Minister could set aside the deportation order or delay its implementation. Further a successful application under s. 3 merely entitled the Applicant to remain within the country and did not result in any defined benefits or status.

The facts of these two cases also demonstrate the ad hoc nature of the procedures. In Ms. D.'s case she was informed of the Minister's proposal to make a deportation order under s. 3 of the Immigration Act 1999 by letter of the 25th February, 2003. In that letter it was pointed out that in accordance with s. 3 of the 1999 Act she was entitled to make written representations to the Minister setting out any reasons why she should be entitled to remain temporarily in the State. No indication was given as to the basis upon which such representations should be made other than identification of s. 3 of the 1999 Act. In s. 3(6) of that Act eleven subparagraphs identified matters which the Minister was obliged to have regard to in determining whether or not to make a deportation order. The only one of those subparagraphs which could relate in any way to the serious harm provisions contained in the Directive was subparagraph (h) which identified "humanitarian considerations". The Minister was bound to comply with Ireland's International obligations and to have regard to the provisions of s. 5 of the Refugee Act, 1996 (non-refoulement) however the letter informing Ms. D. of the proposal to make a deportation order referred only to s. 3 of the 1999 Act. The solicitor acting for Ms. D. replied by letter of the 4th March, 2003, making representations and the specific grounds identified in that letter related to family unity, health and personal matters. There was no identification of any humanitarian considerations other than personal matters nor was there any reference to any potential risk or threat to Ms. D.'s life or person by reason of indiscriminate violence due to the internal situation within her country of origin.

The documents within the Department dealing with the consideration of Ms. D.'s application under s. 3 are dated August, 2004 and one of those documents, the examination of the file by the executive officer, deals with s. 5 of the Refugee Act 1996

prohibition of refoulement notwithstanding the absence of any direct representations in relation to the situation within the Ivory Coast. The executive officer concluded that he was of the opinion that repatriating Ms. D. to her country of origin was not contrary to s. 5 of the Refugee Act 1996. The Minister duly made a deportation order dated the 26th August, 2004. It was not until five months later on the 27th January, 2005, that notification of the making of such order was given to Ms. D. by letter of that date. There is no explanation for the five month delay in the communication of the making of the deportation order. That is notwithstanding that the statutory position is that if Ms. D. had consented in writing to the making of a deportation order under s. 3(8) of the Immigration Act 1999 then if she had not been deported from the State within three months of the making of that order such order would have ceased to have effect.

After the letter of the 27th January, 2005, Ms. D. continued to reside within the State and the deportation order remained unenforced up to the 9th November, 2006. On that date solicitors acting for Ms. D. sought to apply under the Directive for subsidiary protection. That letter provided up-to-date country of origin information dealing with the dangerous internal armed conflict within her country of origin. All such information post dated the consideration carried out in August, 2004. Consideration of the up to date information demonstrates that there is at least an arguable case that the situation within her country of origin as of November, 2006, differed significantly from August, 2004 and potentially demonstrated that her country of origin was unstable and unsafe in that the rule of law had broken down. It would appear to be the case that if Ms. D. was entitled to make an application under article 15 of the Directive, as of November, 2006, that there would be a real issue as to whether or not there existed a serious and individual threat to her life or person by reason of indiscriminate violence in the situation of internal armed conflict if she were to be returned to her country of origin.

It is the Respondent's case that notwithstanding the passage of time and the potential for altered conditions within her country of origin that the statutory position is that Ms. D. is not entitled to apply for subsidiary protection and that the course open to her if she contends that fresh facts and circumstances have arisen between the refusal of an application for asylum and the making of a deportation order is to avail of s. 17(7) of the Refugee Act of 1996. That section states:

> "A person to whom the Minister has refused to give a declaration may not make a further application for a declaration under this Act without the consent of the Minister."

It is therefore the Minister's case that if it is contended that there are fresh facts and circumstances since the making of the deportation order that an application can be made to him to obtain his consent under s. 17(7). That would of itself necessitate consideration on an individual basis by the Minister of whether there were fresh facts and circumstances sufficient to result in him granting such consent. The person making such application would have to identify the fresh facts and circumstances.

The anomalous nature of the approach adopted on behalf of the Minister is demonstrated by the fact that if Ms. D. had not been notified of the making of the deportation order until after the 6th October, 2006, even though the deportation order was signed by the Minister prior to that date that an application for subsidiary protection would be entertained. The basis upon which it is claimed that the Minister can accept applications for subsidiary relief under the Regulations for persons against whom deportation orders have been made prior to the 6th October, but who have not been informed of the making of such order is reliance on s. 4(2) of the Regulations of 2006. That section reads:

> "The Minister shall not be obliged to consider an application for subsidiary protection from a person other than a person to whom s. 3(2)(f) of the

> 1999 Act applies or which is in a form other than that mentioned in para. 1(b)."

It is claimed on behalf of the Minister that there is an implicit discretion reserved by that section to the Minister to consider other applications and that that discretion is unconditional subject only to due compliance with the requirements of constitutional justice and the requirement of the common good. The existence of the discretion claimed by the Respondent entitling the Respondent to consider applications for subsidiary relief from persons who had not been notified of the making of their deportation order prior to the 6th October, 2006, appears to be inconsistent with the position adopted on behalf of the Minister in respect of these Applicants which is to the effect that he cannot consider their application for subsidiary relief and that by implication the discretion contained in s. 4(2) of the Regulations does not and cannot extend to persons such as these Applicants.

If there is an implicit discretion reserved by the provisions of s. 4(2) of the Regulations then there does not appear to be any basis as to why such discretion does not extend to persons such as these Applicants as opposed to the persons who have not been notified of deportation orders until after the 6th October, 2006. The approach adopted by the Respondent in relation to these Applicants is to refuse to consider any application and to proceed on the basis that the Applicants are not entitled to apply and by implication that he has no discretion to consider such applications.

The position in relation to Mr. H. is that he was informed of the fact that the Minister had considered the recommendation to deport Mr. H. and had decided to uphold that decision by a letter in late August, or early September, 2005. Upon receipt of that letter submissions were made on behalf of Mr. H. by letter from the Refugee Legal Service Law Centre dated the 16th September, 2005. That letter expressly raised representations in relation to refoulement and attached certain country of origin information. Those representations were duly considered and his file was examined in April, 2006, resulting in a deportation order being made by the Minister dated the 12th July, 2006. Mr. H. was notified for the making of that deportation order on the 27th July, 2006. As that date predated the 6th October, 2006, Mr. H.'s subsequent application for subsidiary relief was rejected as being inadmissible and the Minister's representative proceeded on the basis that the Minister had no discretion to consider such application.

Council Directive 2004/83/EC sought to harmonise domestic complementary protection. It shifted complementary protection beyond the realm of *ad hoc* and discretionary national practices to a written regime. The Directive is identified as dealing with the following:-

> "On minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted."

At recital 6 of the Council Directive it is stated:-

> "The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States."

There is no doubt that the Council Directive is a codification of existing State practices drawing on elements of the Member States national systems. It is based upon existing practices within the EU States rather than imposing a new regime. In recital 25 it is stated as follows:

> "(25) It is necessary to introduce criteria on the basis of which Applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States."

However, the express objective of the Directive, albeit based on existing practices, is to ensure that Member States apply common criteria. The Directive is for the express purpose of harmonising existing concepts and methods of subsidiary protection within the EU and it is not creating a new system of protection per se. It is rather distilling State practice by drawing on elements of the Member States national systems. That approach does not mean that the Directive might not impose certain limited new protection obligations on individual Member States where existing practices within certain Member States were wider or more extensive than in other Member States. Insofar as the Directive identified obligations within the stated minimum standards, which did not apply within Ireland prior to the directive, the same would in fact impose higher standards than those considered when Applicants had their applications considered under s. 3 of the 1999 Act and s. 5 of the 1996 Act and the then existing international obligations.

If the express purpose of the Directive was to impose no new protection obligations on any Member State then the Directive would have been limited to a codification of the practice within the State providing the least protections to persons in need of international protection. That is not the stated objective of the Directive. The objective of the Directive is the application of common criteria for the identification of persons genuinely in need of protection. The fact that the Directive draws on existing State practice does not lead to the conclusion, contended for by the Respondent, that it was not the purpose of the Directive to impose any new protection obligations on individual Member States of the European Union.

In considering the terms of the Directive this court must first consider whether or not the provisions of the Directive are clear and unambiguous. This court is satisfied that the terms of the Directive are clear and unambiguous. The appropriate cannons for the interpretation of what was then EEC legislation were considered by Murphy J. in *Lawler v. Minister for Agriculture* [1990] 1 I.R. 356. It is recognised in that judgment (at p. 375) that the teleological and schematic approach to the interpretation and application of community legislation could apply where there was ambiguity or uncertainty and that regard could be had to the design or purpose which lies behind the legislation. It is well established that in the presence of ambiguity or uncertainty the court can have regard to the *travaux preparatories* to provide clarification in relation to EU Directives. This approach was followed in the case of *easyCar (UK) Limited v. Office of Fair Trading* a judgment of the Court of First Chamber (case C-336/03) of the 10th March, 2005, where it is stated at para. 20:

> "In that regard, it must be stated that from the outset that neither the Directive nor the documents relevant for its interpretation, such as the *travaux preparatoires,* provide clarification of the exact scope and concept of 'transport services' mentioned in article 3(2) of the Directive. Similarly, the general scheme of the Directive shows only that its objective is to entitle consumers to extensive protection by conferring on them certain rights…"

In this case the Commission proposal and the explanatory memorandum formed part of the *travaux preparatoires* of the Directive. They can be consulted as an aid to interpretation and intention but their real significance and benefit would be where the provisions of the Directive are ambiguous. Insofar as it might have been necessary to have regard to the *travaux preparatoires* the explanatory memorandum confirms the courts view as to the meaning and scope and subject matter of the general provisions of the Directive. At p. 8 of the explanatory memorandum it is stated:

> "The establishment of an area of freedom, security and justice entails the adoption of measures relating to asylum. The specific objective of this imitative is to lay down minimum standards on the qualification and status of refugees and persons who otherwise need international protection in

> Member States. The standards laid down in this proposal must be capable of being applied through minimum conditions in all the Member States. Minimum community standards have to be laid down by the kind of action proposed here. They will help to limit secondary movements of asylum Applicants that result from disparities in Member States practices and legislation."

The explanatory memorandum went on to state at p. 26:

> "No specific EU acquis directly related to subsidiary or complimentary protection exists but the ECHR and the case law for the European Court on Human Rights provides for a legally binding framework, which informed the choice of categories or beneficiary in this proposal. The categories and definitions listed in this chapter do not create completely new classes of persons that Member States are obliged to protect but represent a clarification and codification of existing practice. The three categories listed below in para. 2 of this article are drawn very much from the disparate Member State practices and are believed to encompass the best ones."

The above quotations from the explanatory memorandum confirm, if such confirmation was required, that the intention of the Directive was to identify minimum standards drawing on existing Member State practices but by no means limiting the identified minimum standards to the practices in the Member State providing the least protection or the lowest standards. An analysis of the text and indeed the *travaux preparatoires* and the subject matter of the Directive do not establish that it was never the intention or purpose of the Directive that it would not impose new obligations on States whose existing practices were less than those set out in the Directive. It is also clear that the Directive was based on existing practices whereby each State had decided on whether or not to grant subsidiary protection and that decisions had been made thereunder and that new common criteria would be implemented by a certain date to limit secondary movements of asylum Applicants thereafter. A decision to deport prior to that date would remain effective absent new facts and circumstances being identified. The Directive does not seek to address the situation of persons whose subsidiary rights had already been determined but rather to introduce minimum common criteria from a specific date. Common criteria came in on a certain date. If persons claim that the previous determinations of their subsidiary protection applications should be reviewed then they must avail, not of the terms of the Directive, which does not provide for such review, but of the discretion provided by Regulation 4(2).

The Directive did not expressly prohibit or seek to prohibit persons seeking protection status where they had previously applied and been refused but rather laid down a date for the transposition of the Directive into law within Member States. The Directive did harmonise the standards but did so by reference to the existing practices in Member States. It is therefore necessary to look at the pre-existing right to subsidiary protection within this country as compared to the codified criteria contained in the Directive.

Article 1 of the Directive identifies the purpose of the Directive as:-

> "Lay(ing) down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted."

The framework was not only based on existing international and EC obligations in current Member State practices but it was expressly identified as such in recital 24 which stated that the subsidiary protection identified in the Directive "should be complementary and additional to the refugee protection enshrined in the Geneva Convention".

Article 21 of the Directive states:-

> "Member States shall respect the principle of non-refoulement in accordance with their international obligations."

Chapter 5 of the Directive deals with qualification for subsidiary protection. The definition contained in Article 2 of the Directive identifies that persons eligible for subsidiary protection "means a third country national or a stateless person who does not qualify as a refugee but in respect of when substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country or former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 of the Directive". Article 15 identifies the matters deemed to amount to serious harm and is a central provision in the Directive. What is new about Article 15 as compared to the existing practices in various Member States, such as Ireland, is the provision of a written definition of what amounts to serious harm and the provision of a definitive status for persons identified as qualifying for subsidiary protection. Consideration of a persons need for protection from serious harm under Article 15 only arises when that person does not qualify as a refugee. In theory that could arise either in circumstances where there had been a determination that a person did not qualify for refugee status or where that person had specifically applied for subsidiary protection.

Article 15 states:-

> "Serious harm consists of:
>
> (a) death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment of an Applicant in the country of origin; or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

The Respondent in these cases contends that neither under the terms of the Regulations nor the terms of the Directive, is there any obligation on the Respondent to consider an application for subsidiary protection from persons such as these Applicants in respect of whom a lawful deportation order has been made and notified. I will return to that contention later in this judgment. However, it is also contended on behalf of the Respondent that without prejudice to such contention that prior to the making of a deportation order in respect of each of the Applicants and prior to the Directive coming into effect that the Respondent necessarily considered during the course of each of the Applicants application for asylum and thereafter for humanitarian leave to remain whether or not there was a risk that he or she might be exposed to serious harm as defined in the Directive if returned to his or her home country.

It is submitted on behalf of the Respondent that in general the matters required to be considered prior to the making of a deportation order before the 10th October, 2006, necessarily included matters which would or might give rise to a risk of serious harm under the Directive. That contention was based upon the provisions of s. 3 of the Immigration Act, 1999, and the fact that Ireland is a party to various international human rights instruments including the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the United Nations Convention against torture and other cruel, inhuman and degrading treatment. It is also contended that s. 5(1) of the Refugee Act 1996 (as amended) prohibits the expulsion from this State of a person to "the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or race, religion, nationality, membership of a particular social group or opinion. Section 5(2) provides:

> "Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, *inter alia*, in the opinion of the Minister, the person is likely to be the subject to a serious assault (including a serious assault of a sexual nature)."

The matters to be considered by the Minister under s. 5 of the Refugee Act 1996 differ to some extent from the matters that would now require to be considered under the serious harm definition within article 15 of the Directive. The limitation contained in s. 5(1) of the 1996 Act that the threat be on account of an Applicant's race, religion, nationality, membership of a particular social group or political opinion is not present in article 15 and the obligation that a person be likely to be subject to a serious assault requires a different consideration then the consideration required by article 15(c) of the Directive of a serious and individual threat to a civilians life or person by reason of indiscriminate violence in situations of international or internal armed conflict. It does not appear to follow that consideration of the statutory matters identified in s. 5 of the 1996 Act would necessarily result in the Minister having considered in each and every case matters which he is now obliged to consider under the provisions of article 15 of the Directive dealing with serious harm.

The Respondent also identified that s. 4(1) of the Criminal Justice (UN Convention Against Torture) Act 2000 prohibits the return of a person to another State where:

> "… the Minister is of the opinion that there are substantial grounds for believing that the person would be in danger of being subjected to torture."

Subsection(2) provides:

> "For the purpose of determining whether there are such grounds, the Minister shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Finally it is argued by the Respondent that s. 3(1) of the European Convention on Human Rights Act, 2003, imposes a legal obligation on every organ of the State to exercise its functions in a manner which is compatible with the European Convention on Human Rights. It is argued that as a result of that statutory obligation the Minister had to have regard to the extensive jurisprudence from the European Court on Human Rights on how its provisions impact upon the expulsion by a State party of non-nationals from its territory. In particular article 3 of the Convention provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Arising from the above statutory and legal obligations it is contended that the position prior to the making of the deportations orders in respect of each of the Applicants on a date prior to the 10th October, 2006, was that the Minister was bound to consider and act in accordance with various Acts and international human rights instruments and it is contended on affidavit on behalf of the Respondent that no person would have been deported to their home State on foot of a deportation order made prior to the 10th October, 2006, if to do so would fall foul of what is now set out in relation to subsidiary protection in the Directive and/or the subsidiary protection Regulations.

The position prior to the Directive was that the Minister in considering whether or not to make a deportation order (or to permit leave to remain) had to apply the provisions of s. 5 of the Refugee Act 1996 and s. 3 of the Immigration Act 1999, and also had to consider whether the making of such order would be in breach of any other legal obligation on the part of the Minister. The existence of such obligation was identified and applied by this court in *Kouaype v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clarke J., 9th November, 2005). The court held that the Minister was obliged to consider the State's legal obligations which were identified as extending to the Criminal Justice (United Nations Convention Against Torture) Act 2000

and to other rights guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms. (See *Kozhukarov and Others v. The Minister for Justice Equality and Law Reform and Others* (Unreported, High Court, Clarke J., 14th December, 2005)).

The requirement to address the State's obligations under European Human Rights law insofar as that law might affect the legal position in this jurisdiction became statutorily based after the enactment of the European Convention on Human Rights 2003. In argument before this court such obligation was accepted by counsel for the Respondent and formed part of the argument in support of the contention that no person would have been deported to their home State on foot of a deportation order made prior to the 10th October, 2006, if to do so would fall foul of what is now set out in relation to subsidiary protection in the Directive. It was acknowledged that the Respondent prior to the 10th October, 2006, was obliged to perform his function of deciding whether or not to make a deportation order in respect of failed refugee Applicants in a manner compatible with legal obligations including the States obligations under the Convention provisions.

Subparagraph(b) of article 15 of the Directive identifies that serious harm consists of torture. As identified above the Respondent contends that prior to the implementation of the Directive, the Minister was bound in all cases to consider and act in accordance with the Criminal Justice (United Nations Convention Against Torture) Act of 2000 and could not have returned a person to his or her country of origin if to do so would constitute a breach of the 2000 Act. In the 2000 Act torture was defined in s. 1(1) as meaning "an Act or omission by which severe pain or suffering whether physical or mental, is intentionally inflicted upon a person". The definition of torture in s. 1(1) of the 2000 Act was amended by s. 186 of the Criminal Justice Act 2006 by the insertion after the word omission of the words "done or made, or at the instigation of, or with the consent or acquiescence of a public official". This amendment came into force on the 1st August, 2006. (S.I. No. 390 of 2006).

The consequences of the amendment contained in s. 186 of the Criminal Justice Act 2006 was to limit the definition of torture to Acts or omissions done or made or at the instigation of, or with the consent or acquiescence of a public official. That limitation does not apply in article 15 of the Directive. Article 15 in identifying serious harm refers at subparagraph B to torture or inhuman or degrading treatment or punishment of an Applicant in the country of origin without such limitation. It follows that the consideration of the possibility of a person being potentially subject to torture prior to making a deportation order against that person under the 2000 Act as amended by the 2006 Act after the date of the amendment would be on a different and more limited basis than that provided for in article 15 of the Directive.

Therefore insofar as it is contended that the Minister before making a deportation order on a date prior to the 10th October, 2006, was bound to consider and act in accordance with the Torture Act of 2000 and therefore that no person would have been deported to their home State on foot of a deportation order made prior to the 10th October, 2006, if to do so would have fallen foul of what is now set out in relation to subsidiary protection in the Directive would not be the case from the date of the amendment. The true position is that the definition of torture which the Respondent had to consider subsequent to the implementation of the amendment contained in s. 186 of the Criminal Justice Act 2006 was narrower than that contained in article 15.

In the majority if not the vast majority of cases where the Minister considered whether or not to make a deportation order prior to the implementation of the Directive the Minister would have to have considered the same or identical matters as would require to be considered in relation to "serious harm" as defined in the Directive. However it could not be said that that was the position in all cases. Regulation 4(2) however

provides a mechanism to allow discretion to be considered, and if appropriate, exercised in the exceptional case.

Also as is apparent from the facts in the *Dejola* case there can be instances in which there is a substantial time lapse between the Minister's determination and any attempt to enforce a deportation order. That time lapse obviously gives rise to the possibility that the circumstances either personal or in the Applicant's country of origin would have altered. A long delay increases the possibility of relevant fresh facts or circumstances having arisen from the date of the deportation order.

The Applicants in these case both contend that they have an automatic entitlement under the provisions of the 2006 Regulations to apply for subsidiary protection. The Respondent contends that there is no such right. In the submissions the Respondent contended that the Applicants were persons with no legal entitlement to remain in the State and who had put forward no new or additional basis or facts or circumstances in support of the purported subsidiary protection applications. However the manner in which the Applicant's requests were deemed invalid removed any possibility of inquiring into whether new facts or circumstances might have arisen from the date of the deportation order or indeed whether new or additional facts had been identified.

An examination of the facts in the *Dejola* case demonstrate that that contention, in relation to the absence of any new facts or circumstances, is not correct. What requires to be considered in relation to the Directive and the Regulations is whether persons such as these Applicants who have no legal entitlement to remain in the State have firstly, an automatic right to apply for subsidiary protection under the Directive or secondly, have no entitlement or thirdly, whilst having no automatic entitlement have a right to invoke the Minister's discretion to consider an application for subsidiary protection where new facts or circumstances are identified.

In the affidavit of Dan Kelleher filed on behalf of the Respondent in these proceedings and in the submissions it was contended that the Applicants in these cases were in a similar position to some thirteen thousand non-nationals twelve thousand of whom had been refused refugee status and where the Respondent had signed deportation orders between 1999 and 2006. It was averred in Mr. Kelleher's affidavit that in the period from 1999, to 2006, 2,975 persons had either been deported or chosen to leave the State following the issuance of a deportation order and that it was therefore contended that at least ten thousand non-nationals including these Applicants remained in the State and if such Applicants had an automatic entitlement to make an application for subsidiary protection on or after the 10th October, 2006, irrespective of the facts and circumstance of the individual cases that it would not only cause extreme administrative difficulty but it was one which was not required under the terms of the Directive or the Regulations. (See paragraph 8 of the affidavit of Dan Kelleher sworn on the 6th March, 2007). It would appear on the basis of the information provided by Mr. Kelleher that it is implicitly accepted that the long time period from the issuance of deportation orders to the enforcement of such orders can give rise to the possibility of altered facts and circumstances in individual cases and within the countries of origin. It is also the case that such argument is based upon Applicants having an automatic entitlement irrespective of the facts and circumstances of each individual case.

Under article 38 of the Directive each Member State was obliged to bring into force the laws and Regulations and administrative provisions necessary to comply with the Directive before the 10th October, 2006. The Directive does not purport to back date the application of standards for qualification for subsidiary protection to decisions already made nor having regard to the principle of non-retroactivity could it do so otherwise then by an express provision. The Respondent contends that the Directive does not provide a right to apply for either refugee status or subsidiary protection. A consideration of the

terms of the Directive and of its scope and subject matter certainly makes it clear that after the transposition of the direction into Irish law that persons who thereafter have failed to qualify as a refugee within the State have an automatic right to apply for subsidiary protection. These persons would never have had any consideration of subsidiary protection and would be entitled to same. This is clear from the wording of the Directive and from a number of express provisions such as article 4 which deals with the assessment of applications for international protection. Recital 25 of the Directive states:

> "It is necessary to introduce criteria on the basis of which Applicants for international protection are to be recognised as eligible for subsidiary protection."

It is to be noted that the recital refers to applicant(ions) that "are to be" recognised. It is also clear from article 18 that a Member State is obliged to grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with chapters two and five of the Directive. Such obligation is mandatory and as is apparent from article 4 of the Directive that Member State must assess applications for international protection. There is no doubt that persons who have been found not to qualify as a refugee after the Directive came into effect have an automatic right to apply. The Applicants in this case fall within a different category in that the decision that they did not qualify as a refugee was made prior to the Directive coming into law. Also they had applied for leave to remain.

Statutory Instrument No. 518 of 2006 European Communities (Eligibility for Protection) Regulations 2006 was brought into law for the purpose of giving effect to Council Directive 2004/83/EC. Those Regulations came into operation on the 10th October, 2006. All applications for subsidiary protection are governed by the Regulations. Those Regulations set out the procedure in Irish law by which non-nationals can apply for subsidiary protection. When the Applicants in these cases applied for subsidiary protection the Respondent replied by letter relying on Regulation 3 to the effect that such provisions were not applicable in cases where a deportation order was made by the Minister before the coming into operation of the Regulations on the 10th October, 2006 and went on to state that the Regulations did not apply to persons such as the Applicants and that the applications made under the Regulations were invalid and must be refused.

Regulation 3 states:

> "…these Regulations apply to the following decisions (in these Regulations referred to as 'protection decisions') made on or after the coming into effect of these Regulations:
>
> (a) A recommendation under s. 13(1) of the 1996 Act
>
> (b) An affirmation under paragraph (a) or a recommendation under paragraph (b) of s. 16(2) of that Act;
>
> (c) The notification of an intention to make a deportation order under s. 3(3) of the 1999 Act in respect of a person whom subs. (2)(f) of that section relates;
>
> (d) A determination by the Minister under Regulation 4(4) or 4(5)."

That section makes it clear that the Regulations apply to certain decisions made on or after the 10th October, 2006. There can be no doubt but that persons who are in receipt of a deportation order made after the 10th October, 2006, can apply for subsidiary

protection. It is the Respondent's contention that the Regulations apply and only apply to the decisions set out in Regulation 3. If that is so the Regulations do not apply to a deportation order made prior to the 10th October, 2006.

However the letters of refusal deal only with Regulation 3 and no reference is made to Regulation 4. Regulation 4(1) lays down that applications for subsidiary protection shall be in the form in schedule 1 or a form to the like effect. Regulation 4(1) deals with applications for subsidiary protection of persons who have been refused refugee status on or after the 10th October, 2006 and provides that such persons are entitled to make an application for subsidiary protection to the Minister within the fifteen day period referred to in the notification.

Regulation 4(2) states:

> "The Minister shall not be obliged to consider an application for subsidiary protection from a person other than a person to whom s. 3(2)(f) of the 1999 Act applies or which is in a form other than that mentioned in para. (1)(b). It is contended on behalf of the Respondent that Regulation 4(2) limits the category of persons who may apply for subsidiary protection. Section 3 of the Immigration Act of 1999 deals with deportation orders and s. 3(2) identifies that an order under subs. (1) may be made in respect of … (f) a person whose application for asylum has been refused by the Minister."

The Respondent contends that Regulation 4(1)(b) has no application to either of the Applicants as they are persons in respect of whom a deportation orders have already been made and are not persons in respect of whom a deportation order 'may' be made. It is clear that Regulation 4(2) confirms that a Minister is obliged to consider applications for subsidiary protection from certain persons. The Regulation identifies a number of requirements which must be present before a person has what amounts to an automatic entitlement to apply for subsidiary protection. Those requirements are;

(a) a person must have been refused asylum;

(b) such a person must be someone who the Minister is proposing to make a deportation order against;

(c) such a person must have received from the Respondent a notification of a proposal to deport; (i.e. a person who may be deported)

(d) such a person must make an application within the fifteen day period referred to in the notification; and

(e) the application must be in the prescribed form.

The Applicants in these cases do not meet the above requirements and it therefore follows that under the Regulations they have no automatic right to apply. The Respondent contends that it therefore follows that these Applicants have no entitlement to make any application or for any application to be considered in that an application for subsidiary protection only falls for determination prior to the making of a deportation order under s. 3 of the Immigration Act 1999. It is correct that the automatic entitlement to apply for subsidiary protection relates to applications for determination s prior to the making of the deportation order under s. 3 of the 1999 Act. That is confirmed by the provisions of Regulation 4(5) of the Regulations which directs that the Minister must consider applications for subsidiary protection before any deportation order is made.

However Regulation 4(2) gives the Respondent a discretion to consider applications for subsidiary protection. Regulation 4(2) reserves an implicit discretion to the Minister to consider other applications. Under that Regulation the Minister is entitled to consider applications from individuals other than persons automatically entitled to apply for subsidiary protection. It is this implicit discretion which is relied upon by the Minister when he indicated that persons against whom a deportation order had been made but who had not been notified could apply for subsidiary protection. Those persons do not have an automatic right to apply under the provisions of the Regulations but the Minister acknowledges by his actions that he has a discretion to allow and permit such persons to apply.

I indicated above, in this judgment, that I would return to the contention made on behalf of the respondent that neither under the terms of the Regulations nor the terms of the Directive, is there any obligation on the respondent to consider an application for subsidiary protection from persons such as these applicants. This court is satisfied that a correct reading of the Directive is that it does not place any obligation on a State to review or to reconsider decisions already made in relation to subsidiary protection or humanitarian leave to remain. The express main objective of the directive is clearly set out in Recital 6 as being to ensure that Member State apply common criteria for the identification of persons genuinely in need of international protection. That is a forward looking objective from the date of the transposition of the directive into law in all Member States. Recital 25 makes it clear that the Directive is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. That again identifies a forward looking intention with a future common approach for the recognition of subsidiary protection. Recital 37 also makes it clear that the objective of the Directive is to establish minimum standards. The express intent of the Directive is the establishment of a common policy. That common policy is to apply to persons applying for subsidiary protection after the introduction of such common criteria and does not apply to decisions already made in relation to subsidiary protection or humanitarian leave to remain.

Regulation 3 of the Regulations correctly and properly incorporates into Irish law the requirements of the Directive. That Regulation identifies how the obligations under the Directive are to be applied in Irish law in relation to all subsidiary protection decisions made on or after the coming into operation of the Regulations.

It is clear from a reading of the Directive and the Recitals therein that the Directive was prepared in circumstances where it was recognised that there already existed in the European Union subsidiary protection and that decisions in relation to such subsidiary protection would have already been made in each of the countries under the procedures and laws applying within those countries. What did not exist, in respect of subsidiary protection, was a uniform standard for assessing and determining applications and that is what the Directive sought to address by the introduction of a common policy and the application of common criteria. If, as is contended by the applicants herein, there is an obligation on the respondents to revisit earlier decisions made in respect of refugee protection and subsidiary protection on the basis that the common criteria applied by the Directive are not identical to the criteria applied prior to the introduction of the Directive then that obligation would potentially apply to all Member States. They would be obliged to ascertain whether or not the criteria applied at the time that a particular applicant had his or her application for refugee or subsidiary protection considered were less generous than those introduced in the common criteria within the Directive. The Directive creates common criteria and a right to apply from its introduction. The Directive does not and cannot be read as placing an obligation on a Member State or indeed on all the Member States to review or renew applications for refugee status and subsidiary protection. This court is satisfied that the Directive does not provide these applicants with an automatic

right to apply for subsidiary protection or to have the earlier decisions made in respect of refugee protection and subsidiary protection reviewed or renewed.

Regulation 4(2) permits the Minister to consider an application for subsidiary protection from a person to whom s. 3(2)(f) of the 1999 Act applies. The court is satisfied that it does not preclude the Minister from considering applications from persons to whom s. 3(2)(f) of the 1999 Act does not apply. The clear meaning of Regulation 4(2) is that the Minister has a discretion to consider applications for subsidiary protection from persons such as these Applicants. That discretion must be exercised in accordance with the requirements of constitutional justice and would require the Minister to consider on an individual case by case basis whether or not a person had identified altered facts or circumstances from those which pertained at the time that the Minister determined to make the deportation order.

The Minister's representative stated in reply to the two Applicant's applications for subsidiary protection that they were invalid and must be refused. That rejection relying solely on Regulation 3 and without reference to the discretion that the Minister had under Regulation 4(2) amounts to a failure to recognise the discretion that the Minister has to consider applications from persons other that those automatically entitled to apply for subsidiary protection under Regulation 3.

Person's who had fully pursued an earlier application for subsidiary protection do not have an automatic right to a fresh consideration in disregard of the earlier decision. However if fresh facts and circumstances have arisen then those can be identified and put before the Minister to enable him, following fair procedures, to decide whether or not to exercise his discretion.

The court is satisfied that the Minister has a discretion under Regulation 4(2) and therefore to reject these Applicant's applications for subsidiary protection as being invalid without regard to that discretion is a breach of the Respondent's obligations pursuant to the Regulations. Given the discretion which the Minister has pursuant to Regulation 4(2), such response is a failure to recognise the Respondent's powers under the Regulations.

The Directive brought in new common criteria on a certain date. As regards Ireland those criteria differed, to a small extent, from what existed prior to that date. In considering applications after the implementation date the new criteria applies. If a person, who had already been refused subsidiary protection or leave to remain is able to identify new facts or circumstances arising thereafter then the Minister has a discretion to allow an application for subsidiary protection. There is no entitlement to any fresh consideration and the Directive does not require such but the Minister has an express power to allow same.

The Directive does not impose any requirement to review earlier decisions either as regards subsidiary protection or refugee status. If it did it would have to have done so in express terms given the clear recognition of existing different practices within the Member State. There is no requirement for across the board reconsideration of earlier decisions as that could only arise if there was an unconditional and precise provision to that effect. (See para. 37 *Farrell v. Whitty and Ireland* judgment of First Chamber 19th April, 2007). The Directive came into effect on a precise date. The Directive recognised that decisions in relation to subsidiary protection had been made in Member States prior to that date. Those decisions were valid decisions and if the Directive required such decisions to be re-opened the Directive would have to have stated such.

Under the Regulations the Minister is not obliged to consider applications from persons who were subject to a deportation order prior to the 10th October, 2006, but it is open

to such persons to seek to have the Minister to consider their application if they can identify facts or circumstances which demonstrate a change or alteration from what was the position at the time that the deportation order was made. Those altered circumstances could include a claim that their personal position is effected by the Directives definition of serious harm. Altered circumstances might also arise as a result of the passage of a prolonged period of time resulting in altered personal circumstances or alterations in the conditions in the Applicant's country of origin. It is open to the Minister in determining whether or not to exercise his discretion to have regard to any new or altered, circumstances or facts identified by the person seeking to have the Minister exercise his discretion.

In the light of the finding by this court that the Minister has a discretion under Regulation 4(2) and that a person is entitled to seek to have the Minister exercise such discretion and not have an application ruled out as being invalid without any consideration of such discretion it follows that the issue which has been raised before this court in relation to fair procedures and the principle of equality of treatment does not arise.

The Regulation which transposes the Directive into Irish law fully and properly brings into force the laws, Regulations and administrative provisions necessary to comply with the Directive. In relation to persons who have deportation orders made after the 10th October, 2006, those persons have an automatic entitlement to apply. In relation to persons who had deportation orders made prior to that date such persons have an entitlement to apply to the Minister to have him exercise his discretion under Regulation 4(2).

The letters written to the Respondents herein by the assistant principal officer acting on behalf of the Minister ruling the two Applicants' request for subsidiary protection as being invalid and refused were *ultra vires* the Regulations in that there was a failure to recognise the discretion vested in the Minister under Regulation 4(2).

The court will hear the parties as to the terms of the order of certiorari which should be made in the light of this judgment and as to the order of *mandamus* which is required.