

THE SUPREME COURT

[Appeal No: 393/2008 and 64/2009]

Murray C.J.
Denham J.
Hardiman J.
Fennelly J.
Macken J.

BETWEEN/

ENITAN PAMELA IZEBBEKHAI, NAOMI ALERO IZEBBEKHAI (A MINOR)
AND JAMIMA TEMISANRE IZEBBEKHAI (A MINOR)
(BOTH SUING BY THEIR MOTHER AND NEXT FRIEND
ENITAN PAMELA IZEBBEKHAI

APPLICANTS/APELLANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment delivered on the 9th day of July, 2010 by Denham J.

1. A preliminary issue has arisen for determination in this case. The query is whether Council Directive 2004/83/EC of the 29th April, 2004, referred to in this judgment as "the Directive", and/or the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006), referred to in this judgment as "the Regulations", which implement the Directive in Irish law, impose an obligation on the Minister to consider the application of the appellants, or whether the Directive and/or the Regulations apply to the appellants in any manner.
2. Enitan Pamela Izevbehai, Naomi Alero Izevbehai and Jamima Temisanre Izevbehai, the applicants/appellants, are referred to in this judgment as "the appellants". The Minister for Justice, Equality and Law Reform, the respondent, is referred to as "the Minister".

Council Directive

3. On the 29th April, 2004, the Council of the European Union adopted the Directive. It is described in its title as being 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 (O.J. L304 30.9.2004). It relates to the granting of subsidiary protection status.

4. Article 18 of the Directive states: -

"Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V."

5. Chapter II deals with the assessment of applications for international protection and Chapter V covers the qualification for subsidiary protection.

6. The recitals refer, inter alia, to a common policy on asylum, including a Common European Asylum System, as being a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. Recital 6 states that: -

"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."

Thus the Directive introduces minimum standards. However, the Member States have power to introduce or maintain more favourable standards.

7. Article 2 of the Directive provides definitions. Paragraph (e) states: -

"'person eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom 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 of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

8. Article 15 defines "serious harm" as consisting of: -

"(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment 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 Regulations

9. The Regulations came into operation on the 10th October, 2006. In the Regulations it is provided as follows: -

"3. (1) Subject to paragraph (2), these Regulations apply to the following decisions (in these Regulations referred to as "protection decisions") made on or after the coming into operation of these Regulations:

(a) a recommendation under section 13(1) of the 1996 Act;

(b) an affirmation under paragraph (a) or a recommendation under paragraph (b) of section 16(2) of that Act;

(c) the notification of an intention to make a deportation order under section 3(3) of the 1999 Act in respect of a person to whom subsection (2)(f) of that section relates;

(d) a determination by the Minister under Regulation 4(4) or 4(5).

(2) Nothing in these Regulations shall be taken to extend or reduce the functions of the Refugee Applications Commissioner or the Refugee Appeals Tribunal (within the meaning of the 1996 Act) in determining whether a person is a refugee.

[Emphasis added]

Application for subsidiary protection

4. (1) (a) A notification of a proposal under section 3(3) of the Act of 1999 shall include a statement that, where a person to whom section 3(2)(f) of that Act applies considers that he or she is a person eligible for subsidiary protection, he or she may, in addition to making representations under section 3(3)(b) of that Act, make an application for subsidiary protection to the Minister within the 15 day period referred to in the notification.

(b) An application for subsidiary protection shall be in the form in Schedule 1 or a form to the like effect.

(2) The Minister shall not be obliged to consider an application for subsidiary protection from a person other than a person to whom section 3(2)(f) of the 1999 Act applies or which is in a form other than that mentioned in paragraph (1)(b).

(3) In determining whether a person is eligible for subsidiary protection, the Minister—

(a) shall take into consideration, in addition to matters mentioned in Regulation 5, any particulars furnished by the applicant under paragraph (1)(b); and

(b) may take into consideration—

- (i) *the information or documentation taken into consideration in relation to the determination of the applicant's application for a declaration, and*
- (ii) *such other information relevant to the application as is within the Minister's knowledge.*

(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.*

(6) Nothing in these regulations shall affect the discretionary power of the Minister under section 3 of the 1999 Act."

[Emphasis added]

Act of 1999

10. Section 3(1) of the Immigration Act, 1999, referred to in this judgment as "the Act of 1999", gives the Minister power to make a deportation order. Section 3(2)(f) of this Act provides: -

"An order under subsection (1) may be made in respect of—

...

(f) a person whose application for asylum has been refused by the Minister"

Submissions

11. Oral and written submissions were made on behalf of the appellants and the Minister. Essentially counsel were addressing the construction of the Directive and the Regulation. On behalf of the appellants it was submitted, inter alia, that there is a requirement under Article 18 of the Directive to grant subsidiary protection status, with all its attendant rights, to eligible persons and that there is nothing in the Directive which excludes from that obligation persons who have already been permitted to reside in the State under the old informal subsidiary protection system. Such person may well, after the 10th October, 2006, wish to apply for the new formal status of subsidiary protection. It was submitted that the Minister should have a discretion to allow such persons to apply for subsidiary protection. It was also submitted that if there is no discretion in Regulation 4(2), or elsewhere, for the Minister to accept for consideration a subsidiary protection application then a whole series of persons will be deprived arbitrarily of subsidiary protection status. Further, if there is no reserved discretion, it was submitted that the State would be in breach of Article 18 of the Directive in relation to several categories of persons. In addition, persons explicitly asserting no entitlement to refugee status and claiming subsidiary protection only, would be forced to embark on and exhaust the long drawn out

refugee status determination process prior to being permitted to apply for subsidiary protection.

On behalf of the Minister it was submitted that neither the Directive nor the Regulations permit the making of an application for subsidiary protection by a person in respect of whom a deportation order was made prior to the 10th October, 2006. That being the case, there was no obligation on, or discretion of, the Minister under the Directive or the Regulations to consider any such application.

12. In considering this preliminary issue it is necessary to construe the Directive and the Regulations.
13. The Directive requires Member States to grant a form of international protection status, called subsidiary protection status, to persons who do not have the protection of refugee status but who are in need of a form of international protection. The Directive explicitly states that: "Member States shall grant subsidiary protection status" to an eligible person: see Article 18 of the Directive which is set out in full earlier in this judgment. The Directive is dated the 29th April, 2004, and it does not itself cite any commencement date. Clearly this Directive places an obligation on Member States to grant subsidiary protection to eligible persons. The Directive itself does not exclude persons who have been informed of an intention to deport. There is no temporal limitation placed by the Directive.
14. A person eligible for subsidiary protection is defined in Article 2(e) of the Directive, as has been set out in full earlier in this judgment. The appellants have raised in the substantive case the risk of female genital mutilation of the minors. Nothing turns on the said definition or the substantive case in this preliminary issue.
15. It is necessary to consider the terms of the Regulations to see how the Directive has been implemented into Irish law.
16. Regulation 3(1) states that the Regulations apply to specific protection decisions made on or after the coming into operation of the Regulations, which was the 10th day of October, 2006. The list of decisions includes: (a) a recommendation under s.13(1) of the Refugee Act, 1996; (b) an affirmation under paragraph (a) or a recommendation under paragraph (b) of section 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 to whom subsection 2(f) of that section relates; and (d) a determination by the Minister under Regulation 4(4) or 4(5). Subparagraphs (a), (b) and (c) clearly relate to acts on or after the coming into operation of the Regulations. In relation to (c), the notification of an intent to deport, the notification of the appellants was prior to the coming into operation of the Regulations. Thus, if this were the only relevant section it would not apply to the appellants as the notification of intent to deport the appellants was made prior to the 10th day of October, 2006.

17. However, Regulation 3(1)(d) refers to a determination by the Minister under Regulation 4(4) or 4(5). These paragraphs refer to the determination of the Minister that a person is or is not eligible for subsidiary protection and is or is not permitted to remain in the State. No such determination could be made prior to the Regulations coming into force. All such decisions as to subsidiary protection would be made after the coming into operation of the regulations. This creates some ambiguity given the terms of Regulation 3(1).
18. Regulation 4(1) makes provision for an application for subsidiary protection. At the core of this analysis is Regulation 4(2). Regulation 4(2) has been set out earlier but for ease of analysis it is restated:-

"(2) The Minister shall not be obliged to consider an application for subsidiary protection from a person other than a person to whom section 3(2)(f) of the 1999 Act applies or which is in a form other than that mentioned in paragraph (1)(b)."
[Emphasis added]

The construction of these words is at the heart of the case. What do they mean?

19. The words "shall not be obliged to consider" must have a meaning. Another form of words could have been chosen, such as "shall not consider". This latter hypothesised version would exclude the Minister from considering any other than the form of applications listed. However, that was not the choice of words. Instead the regulation states that "The Minister shall not be obliged to consider ..."
20. I interpret the word "obliged" as having its ordinary meaning, being "compelled", "restrained", "bound by". Thus these words of the regulation may be construed as:

(2) The Minister shall not be compelled to consider an application for subsidiary protection from a person other than a person to whom section 3(2)(f) of the 1999 Act applies or which is in a form other than that mentioned in paragraph (1)(b)."
[Emphasis added]

21. Thus the words "The Minister shall not be obliged to consider an application for subsidiary protection from a person ... other than", clearly indicates that the Minister is obliged to consider an application for subsidiary protection from the persons listed. A reasonable inference from these words is that the Minister is not obliged to consider applications from other persons. The words are somewhat ambiguous – however they clearly differentiate between applications which the Minister is obliged to consider and others which he is not obliged to consider. It establishes two situations, one where the Minister is obliged to consider an application and another where he is not. The words infer that while the Minister is not obliged to consider an application from a person other than a person to whom section 3(2)(f) of the Act of 1999 applies, any other application is not excluded from consideration. Consequently, the regulation puts the Minister in the position where he or she, while not obliged to consider such other applications, is not excluded from considering such other applications. Thus it leaves to the Minister a discretion in relation to such other applications.

22. Under this construction of the Regulations the Minister has a discretion to consider an application other than those specifically specified in Regulation 4(2). There may be many reasons for such a discretion. However, whatever the reason, the regulation gives this discretion to the Minister.
23. The discretion under Regulation 4(2) is to be distinguished from the fundamental sovereign discretion of the State which may be exercised by the Minister on behalf of the State over non-Irish nationals.
24. The above interpretation of Regulation 4(2) is supported by the terms of Regulation 3(1)(d) and Regulation 4(4). Regulation 3(1)(d) provides that the Regulations apply to specific decisions made on or after the coming into operation of the Regulations, specifically in 3(1)(d), it applies to a determination by the Minister under Regulation 4(4) or 4(5).
25. Regulation 4(4) provides: -

"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."

Regulation 4(5) refers to a decision of the Minister that a person is not eligible for subsidiary protection. These subsections related to a decision by the Minister after the coming into operation of the Regulations, as to whether or not a person is eligible for subsidiary protection status. It is this decision which the appellants seek. This free-standing subsection, referred to in Regulation 3(1)(d), underpins my interpretation of Regulation 4(2), as recognising a discretion, not an obligation, of a Minister to consider such an application. If a Minister exercises his discretion under Regulation 4(2) then he or she may grant subsidiary protection status pursuant to Regulation 4(4). Alternatively, the Minister may determine that a person is not eligible for subsidiary protection status under Regulation 4(5). These decisions could not be made until after the Regulations came into existence and which are specifically provided for in the Regulations. Consequently, I am satisfied that the Minister has a discretion under Regulation 4(2) to consider an application from the appellants.

26. There is no issue of retrospectivity. There is no question of the Directive or the Regulations having a retrospective effect. The applications are current. They arose after the notice of intention to deport, which is not the decision in issue. Under Regulation 4(2) the Minister has a discretion to consider the application and make a decision under Regulation 4(4) or 4(5).
27. Further, I am satisfied that such an interpretation on the words of Regulation 4(2) is entirely consistent with the Directive. This construction ensures that the State complies with its obligations under Article 18 of the Directive.

N.H. v. Minister for Justice

28. An earlier decision of the High Court was opened before this Court. In *N.H. v. Minister for Justice* [2008] 4 I.R. 452, deportation orders had been made on the applicants prior to

the coming into force of the Regulations on the 10th October, 2006. The applicants applied for subsidiary protection and the Minister notified them that their requests were invalid and refused on the basis that the Regulations had come into force after the deportation orders had been made and were therefore inadmissible pursuant to Regulation 3. The applicants brought proceedings seeking to quash the refusal to consider their applications contending that they had an automatic right under the provisions of the Regulations to apply for subsidiary protection. The Minister submitted that he had no discretion to consider applications for subsidiary protection from persons such as those applicants who had been notified of deportation orders prior to the 10th October, 2006. The High Court (Feeney J.) granted the reliefs sought and held that the terms of the Directive were clear and unambiguous and that the Regulations had fully and properly transposed the Directive into Irish law. Further, that the obligations imposed on the Minister by the Directive to consider certain matters prior to making a deportation order were higher than those existing prior to the implementation of them. It did not follow that a consideration of the matters relating to *refoulement*, which he was obliged to consider under the provisions of s.5 of the Refugee Act, 1996 and the Criminal Justice (United Nations Convention Against Torture) Act, 2000 prior to making a deportation order, would necessarily result in the Minister having considered in each and every case where he had made a deportation order prior to the introduction of the Regulations matters which he was now obliged to consider under the provisions of the Directive. Thus, after the transposition of the Directive into Irish law, persons who had failed to qualify as a refugee within the State had an automatic right to apply for subsidiary protection. It was held that the Directive did not provide persons who were subject to a deportation order prior to the coming into force of the transposing regulations with an automatic right to apply for subsidiary protection or to have the earlier decisions made in respect of the refugee protection and subsidiary protection reviewed or renewed. However, he held that Regulation 4(2) of the Regulations reserved an implicit discretion to the Minister to consider applications for subsidiary protection from individuals other than persons automatically entitled to apply for subsidiary protection. That discretion had to 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 the Minister made the deportation order. The learned trial judge analysed both the Directive and the Regulations. He said, at p.471:-

"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 of 2004, he 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."

The learned trial judge then addressed the issue before him in that case and he stated:-

"The [Minister] contends that reg. 4(1)(b) has no application to either of the applicants as they are persons in respect of whom deportation orders have already been made and are not persons in respect of whom a deportation order 'may' be made. It is clear that reg. 4(2) confirms that the [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. These 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 [Minister] 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."*

[Emphasis added]

It was contended that the applicants in that case did not meet the requirements. However, the learned trial judge went on to find that the Minister had a discretion under Regulation 4(2). He stated, at p.475:-

"However reg. 4(2) gives the [Minister] 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 of 2006 but the [Minister] acknowledges by his actions that he has a discretion to allow and permit such persons to apply."

29. An important factor in *N.H. v. Minister for Justice* [2008] 4 I.R. 452 was that the Minister conceded that there was an implicit discretion reserved to the Minister but that it did not cover the applicants in that case. In relation to Regulation 4(2) of the Regulations the learned trial judge recited, at p.462, the following:-

"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..."

And at p.463:-

"If there is an implicit discretion reserved by the provisions of reg. 4(2) of the Regulations of 2006 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 had not been notified of deportation orders until after the 6th October, 2006..."

30. Thus it appears that the Minister made a limited concession in *N.H. v. Minister for Justice* that there was an implicit discretion reserved by Regulation 4(2) to the Minister but that it did not cover the applicants in that case. However, on that concession the learned trial judge found that there was a broader implicit discretion. Both decisions, that of the Minister and the learned trial judge, were made on a construction of Regulation 4(2).
31. Quite apart from the above decisions, I have considered the Regulations independently and have come to the view that the Minister does have a discretion under Regulation 4(2).

Conclusion

32. This appeal relates to a construction of regulations, national law. The relevant legal issue relates to a confined group of people on whom a deportation order was made prior to the 10th October, 2006. At the heart of the matter is whether the words of Regulation 4(2) mean that the Minister retains a discretion to consider an application for subsidiary protection. I am satisfied that under the regulations the Minister does retain a discretion to consider an application, however, he is not obliged to consider such an application.
33. For the reasons given, on construing the Regulations, I am satisfied that the Minister has a discretion under Regulation 4(2) to consider the application of the appellants. The appellants do not have a right to have their application considered. The Minister is not obliged to consider the application. However, the Minister has a discretion to consider the application by the appellants, and I would answer the preliminary issue accordingly.