THE SUPREME COURT

JUDICIAL REVIEW

APPEAL NO. 2009/64 JR & APPEAL NO. 2008/303

High Court Record No. 2008 300 JR

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

BETWEEN:

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

APPLICANTS/APPELLANTS

-AND-

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Fennelly delivered the 9th day of July 2010.

1. Having exhausted all the possibilities of the asylum and refugee system including judicial review of deportation orders, the appellants have asked the Minister and now the courts, by way of a further application for judicial review, to afford them "subsidiary protection". They failed before the High Court (McGovern J.). He held that they had not brought themselves within the scope of an earlier High Court judgment (*N.H. v Minister for Justice, Equality and Law Reform* 2008 4 I.R. 452, hereinafter "*N.H. v MJELR*") where Feeney J. held that the Minister had a discretion to grant subsidiary protection even in cases not provided for in the regulations providing for applications for subsidiary protection (the European Communities (Eligibility for Protection) Regulations (S.I. No. 518) 2006). On appeal, this Court invited the parties to address, as a preliminary issue, whether the regulations conferred on the Minister a discretion to grant subsidiary protection other than in the cases provided for, specifically a discretion or power to reconsider deportation orders made prior to 10th October 2006, where new circumstances were shown to exist. This judgment deals only with that preliminary issue.

2. The preliminary issue cannot be considered in isolation from the background facts which commence with the arrival of the appellants in the State in January 2005 and their pursuit of administrative and judicial remedies designed to permit them to remain in the State.

Background facts and history: asylum and refugee procedures

3. The first named appellant (I will refer to her by name, Mrs. Izevbekhai) is the mother of the second and third named appellants. They were born in Nigeria: Naomi was born on 28th December 2000 and Jemima on 17th August 2002. I will refer to them by their

names. Mrs. Izevbekhai says that she had two earlier children, a boy who is now aged about 14 years, still living with Mrs. Izevbekhai's husband in Nigeria, and a girl, Elizabeth, who was born in 1993 but died in 1994. The treatment and death of Elizabeth in Nigeria are, in many ways, central to all the questions that have been raised. The Minister has sought to introduce evidence casting doubt on whether Elizabeth ever existed, a matter which cannot be resolved by this judgment. For the purposes of resolving the technical legal issues, it is not necessary to do so.

4. The appellants arrived in the state via the Netherlands on 20th January 2005. Mrs. Izevbekhai applied for declarations of refugee status pursuant to the Refugee Act, 1996 on her own behalf and on behalf of Naomi and Jemima. She filled out and submitted the relevant forms and questionnaires and was interviewed by an officer of the Office of the Refugee Commissioner (ORAC) on 18th February 2005. The basis of her claim for refugee status was that she was in fear for her own life and the lives of her daughters, if they were returned to Nigeria, as a result of threats from the family of her husband to carry out female genital mutilation (FGM) on Naomi and Jemima.

5. The officer of ORAC in a report of 24th February 2005 found that Mrs. Izevbekhai's fears that Naomi and Jemima would be subjected to FGM if returned to Nigeria were not objectively well founded and recommended that they should not be declared refugees.

6. The appellants appealed to the Refugee Appeals Tribunal. There was an oral hearing on 28th April 2005 at which the appellants were represented by counsel. The case for the appellants was, as before, that they feared persecution in Nigeria at the hands of Mrs. Izevbekhai's husband's family, particularly her mother-in-law, all centred on the threat to subject the two girls to FGM. Mrs. Izevbekhai supported this claim by reference to her account of the subjection of her daughter Elizabeth to FGM. She said that Elizabeth was born on 11th February 1993 but died in Nigeria as a result of bleeding resulting from FGM. This account was supported by a statement attributed to Dr Unokanjo, who had delivered her first two children but had refused to perform the FGM operation and was present at a hospital in Lagos when Elizabeth was brought in dying. The Refugee Appeals Tribunal was not satisfied that the appellants had left Nigeria for a Convention reason and had not demonstrated to a reasonable degree of likelihood a well-founded fear of persecution. The Tribunal affirmed the recommendation of ORAC.

7. The appellants made no application for leave to apply for judicial review of the decision either of ORAC or of the Refugee Appeals Tribunal.

8. The Minister wrote to the Mrs. Izevbekhai and the other appellants on 13th September 2005 informing them that he had decided in accordance with section 17(1)(b) of the Refugee Act, 1996 to refuse to declare their status as refugees, for the reasons set out in the recommendation made by the Refugee Appeals Tribunal. He told them that their entitlement to remain temporarily in the state had, therefore, expired and that he proposed to make deportation orders pursuant to section 3 of the Immigration Act, 1999 in respect of herself and of Naomi and Jemima. He offered them certain options one of

which was to make representations to him setting out the reasons why she and her two children should be allowed to remain temporarily in the State.

9. The Refugee Legal Service, which was then acting on behalf of the appellants, sent representations to the Minister on 4th October 2005 pursuant to section 3 of the Act. The appellants restated in detail their claim that Naomi and Jemima would be subjected to FGM if returned to Nigeria. These representations were examined in the Department of Justice Equality and Law Reform. A departmental analysis dated 21st of November 2005 recommended that deportation orders be signed in respect of each of the appellants. The Minister made three deportation orders on 23rd November 2005. On 29th November 2005 the Minister wrote, as required by the section, informing each of the appellants that he had decided to make deportation orders pursuant to section 3 of the Act of 1999, as he had proposed. He notified them that they were required to cooperate with the Garda Síochána in making arrangements for their deportation. They were required to present themselves to the Garda National Immigration Bureau on 5th December 2005. They failed to do so and were classed as evaders. Mrs. Izevbekhai went into hiding. Naomi and Jemima were taken into care and were later made the subject of interim care orders requiring them to be maintained in the care of the Health Service Executive.

10. Mrs. Izevbekhai was apprehended by gardaí on 12th January 2006 and placed in detention in prison.

Legal proceedings: judicial review of deportation orders

11. On 13th January 2006 a notice of motion was issued in the High Court on behalf of the appellants seeking an extension of the time within which they could bring judicial review proceedings challenging the deportation orders, the permitted time having expired. On 18th January 2006 a notice of motion, accompanied by a Statement of Grounds seeking leave to apply for judicial review was issued. On the return date, 23rd January 2006, the High Court (Finlay Geoghegan J) received an undertaking from the Minister not to deport Mrs. Izevbekhai or Naomi or Jemima pending determination of the judicial review proceedings. She was released from detention. McKechnie J, on 10th November 2006, granted an extension of time for leave to apply for judicial review of the deportation orders.

12. The substantive application for judicial review by way of certiorari of the deportation orders was heard over three days by Feeney J. In a judgment of 30th January 2008 (see *I & Others v the Minister for Justice, Equality and Law reform* [2008] IEHC 23), Feeney J refused the applications for judicial review. The learned judge observed, in the course of his judgment, firstly, that:

> *" the basis identified for consideration was that the first named applicant had claimed that she left Nigeria to avoid female genital mutilation being performed on her daughters against her will by her husband's family, and that she did so in circumstances where her eldest daughter had died following female genital mutilation."*

13. Feeney J proceeded:

> *"It was also clear that the applicants' account of her family history was not called into question but rather the basis for rejecting the claim for refugee status was the lack of evidence that the applicant was genuinely at risk, and that it was not enough for the applicant to truly believe herself and her children to be in jeopardy but rather that there must be objective facts to provide a concrete foundation for the concern which induces her to seek refugee status."*

In this connection, a matter which is of some importance, he noted that:

> *"The consideration by the Refugee Appeals Tribunal and the information considered by the Minister and his officials both took place against a background where the first named applicant's claim in relation to the death of her first daughter was well known and where that account was not in dispute."*

14. It is important to note that, whatever about a more recent notice of motion issued by the Minister seeking to introduce evidence which puts in issue the history in relation to Elizabeth advanced by Mrs. Izevbekhai, that account has been accepted as true and not questioned throughout the asylum or refugee procedures and all subsequent judicial review proceedings in the High Court. That position continues to prevail insofar as the preliminary issue in the present appeal is concerned.

15. Feeney J commented as follows on the claim that the appellants had submitted evidence of new or altered circumstances:

> *"The applicants in this case place considerable emphasis on additional material which it is claimed was properly available for consideration. In particular a medical report from a doctor who treated the first named applicant's deceased daughter. There was also a medical certificate identifying the deceased child's cause of death. However consideration of the overall factual position in this case demonstrates that this information does not provide or support a significant change in material circumstances. That follows because the consideration by the Refugee Appeals Tribunal and the information considered by the Minister and his officials both took place against a background where the first named applicant's claim in relation to the death of her first daughter was well known and where that account was not in dispute."*

16. Consequently, Feeney J declined to quash the deportation orders. Furthermore, on 13th March 2008, he refused to grant a certificate that his decision involved a point of law of exceptional public importance such as would warrant an appeal to this Court.

Application for subsidiary protection

17. On 3rd March 2008, Mrs. Izevbekhai made three separate applications to the Minister, on behalf of herself and of Naomi and Jemima, for subsidiary protection pursuant to the European Communities (Eligibility for Protection) Regulations (S.I. No. 518) 2006.

(hereinafter "the Regulations"). The relevant provision is Regulation 4(2), whose interpretation is the subject of the preliminary point of law considered in this judgment.

18. In answer to one of the questions on the application form Mrs. Izevbekhai stated:

> "The Applicant has sought to protect her two infant daughters Naomi and Jemima from Female Genital Mutilation being perpetrated upon them by family members and persons acting in concert with them. By virtue of her stance in this regard to prohibit this practice she faces personal physical harm, danger and threat from family members and others working in concert with them. This practice was forcibly carried out on her first child Elizabeth who died as a consequence of it."

19. Shorter statements to similar effect were contained in the statements on behalf of Naomi and Jemima. The application was accompanied by 33 supporting documents. These included four documents offered as affidavits in support of the history of Elizabeth and a number of documents, reports and submissions regarding the prevalence of the practice of FGM in Nigeria.

20. The internal departmental analysis leading up to the Minister's decision refers to the then recent High Court decisions (including *N.H. v MJELR*) to the effect that *"the Minister has discretion to consider such an application, where the applicant has identified altered facts or circumstances from those which pertained at the time when the Minister made the deportation order."* The correctness of the assumption that the Regulations conferred such a discretion on the Minister is the subject matter of the preliminary question now before the court. I will reserve discussion on this until later.

21. Again, it should be noted that the Minister's analysis accepted without question Mrs. Izevbekhai's account of what she said had occurred in relation to her eldest daughter, Elisabeth. The decisive part of the analysis should be quoted in full, since it formed the basis of the Minister's decision, and is as follows:

> *"although it is acknowledged that some of these new documents were not considered by the Minister at the time of signing the deportations [sic] orders in respect of Ms. Izevbekhai and her two daughters, Naomi...... and Jemima......, it is clear that the issues raised in these Subsidiary Protection applications and the documentation submitted in support of the applications are similar in content to those previously submitted prior to the signing of the deportation orders."*
>
> *"Furthermore, the documentation submitted in support of these applications do not [sic] constitute altered circumstances in respect of Ms. Izevbekhai and her two daughters, Naomi...... and Jemima......, since their cases were last examined......"*

22. By a letter of 19th March, signed by Pat X. Carey of the Repatriation Unit, the Minister conveyed his decision. He also referred to the then recent High Court decisions which he summarised as interpreting the Regulations to the effect that the Minister "has a

discretion……. to accept and consider an application for Subsidiary Protection from an applicant who:

a) does not have an automatic right to apply (i.e. whose deportation order is dated prior to 10 of October 2006) and

b) has identified new facts or circumstances which demonstrate a change of position from of that at the time the deportation order was made."

23. The Minister said that, following consideration of the information submitted it had been "concluded that there [were] no grounds which would enable the Minister to exercise his discretion under Regulation 4(2)." He had "decided not to exercise his discretion" to accept and consider the Subsidiary Protection applications. He said that the Garda National Immigration Bureau had been requested to proceed with the enforcement of the deportation orders.

24. On 20th March 2008 the High Court (Edwards J) granted to the appellants leave to apply for judicial review of the Minister's decision of 19th March 2008 not to exercise his discretion under Regulation 4(2) and to refuse to consider their applications for subsidiary protection. He granted an interlocutory injunction restraining the deportation of the appellants pending the determination of the proceedings. Since this order had been made ex parte, the question of the injunction was reconsidered at the behest of the Minister.

25. On 18th November 2008, Hedigan J, in a closely reasoned judgment, refused to grant an interlocutory injunction restraining the deportation of the appellants pending the determination of the proceedings. He held that the appellants had not shown that there that there was a fair question to be tried. In so holding, he rejected the appellants' submission that the mere fact that an order had been made granting leave to apply for judicial review meant automatically that this requirement was satisfied.

26. However, the appellants were not, in fact, deported following complaint to the European Court of Human Rights on behalf of the appellants arising from the decision of Feeney J.

The High Court Judgment

27. McGovern J delivered judgment on the application for judicial review of the Minister's decision to refuse subsidiary protection on 27th January 2009. The learned judge treated it as "an accepted fact" that Mrs. Izevbekhai's eldest daughter Elizabeth had died in July 1994 from haemorrhage associated with FGM. McGovern J had to consider the application for judicial review by way of an application for an order of certiorari of the Minister's refusal to consider the appellants' application for subsidiary protection. The appellants had applied to the Minister pursuant to the terms of the Regulations, in particular Regulation 4(2) thereof.

28. The learned judge applied the interpretation of Regulation 4(2) adopted in the judgment of Feeney J in the case of *N.H. v MJELR,* cited above, as applied in a number of subsequent High Court judgments. That meant that Regulation 4(2) of the Regulations had conferred discretion on the Minister to grant subsidiary protection provided that he

was satisfied that there were such new or altered facts or circumstances that a change had taken place in the position of the appellants from that which prevailed at the time the deportation order was made. The Minister had, of course, decided that there had been no material change. The task of the High Court was limited to deciding whether the Minister had been entitled to reach that conclusion.

29. McGovern J expressed himself satisfied that the allegedly new material relied upon by the appellants did not show altered circumstances or new facts but merely amounted to amplification of the case which had been made by the appellants and, in some cases, corroboration of it. He held that there had been nothing irrational in the Minister's decision to conclude that there were no grounds for him to exercise his discretion under Regulation 4(2) of the Regulations. He also held that the Minister had given sufficient reasons for his decision and that he had not improperly fettered his own discretion.

The Appeal

30. The appellants, in their notice of appeal, mount a broad challenge to the decision of McGovern J on all grounds but in particular his conclusion that they had not demonstrated the existence of altered circumstances or new facts.

31. On the presentation of the appeal, it became apparent that the decision of the High Court was predicated on an interpretation of Regulation 4(2) of the Regulations which, although it had been the subject of several decisions of the High Court, had not been the subject of any decision by this Court. This Court, accordingly, invited the parties to make submissions on that issue. The question is whether Regulation 4(2) of the Regulations does in fact and in law confer on the Minister a discretion to grant subsidiary protection to persons in respect of whom a deportation order had been made and notified prior to 10th October 2006, provided that the subject of that deportation order can show, to the satisfaction of the Minister, that there are new facts or altered circumstances which significantly change the position of the applicant from that which existed at the time of the making of the deportation order.

32. The Regulations were made on 9th October 2006 for the purpose of giving effect to Council Directive 2004/83/EC of 29th April 2004 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. (hereinafter "the Council Directive" or the "Directive"). They came into operation on 10th October 2006 (see Regulation 1 (2)).

33. The Directive was adopted on the legal basis of Article 63, points 1(c), 2(a) and 3(a) of the Treaty Establishing the European Community in the broader context of the furtherance of a common policy on asylum, including a Common European Asylum System.

34. Article 63 occurs in Title IV of the Treaty entitled: "VISAS, ASYLUM, IMMIGRATION AND OTHER POLICIES RELATED TO FREE MOVEMENT OF PERSONS." Title IV is concerned principally with asylum and immigration, but also extends to *"safeguarding the rights of*

nationals of third countries." (see Article 61(b)). Of the three legal bases recited by the Directive derived from Article 63, neither the first nor the third can have any relevance to subsidiary protection. Point 1(c), relates to *"minimum standards with respect to the qualification of nationals of third countries as refugees*; point 3(a) relates to *"conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion*." Clearly, therefore, only point 2(a) can be relevant to persons such as the appellants, who do not qualify for refugee status and who are not applicants for long-term visas or residence permits. That provision authorises the laying down of *"minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection*." Having regard to the terms of these Articles and in spite of references to the approximation of rules, the Directive must be considered as laying down "minimum standards." It does not depend for its validity on any legal or administrative provision for subsidiary protection previously in force in the Member States.

35. Recital 6 to the Directive 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."*

36. It notes, in particular, the role of *"approximation of rules on the recognition and content of refugee and subsidiary protection status…"* Recital 24 states also states that: "Minimum standards for the definition and content of subsidiary protection status should also be laid down."

37. Article 2(e) defines the *"persons falling within the scope of this Directive,"* insofar as it concerns subsidiary protection (see recital 11) in the following terms:

> *" '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.."*

38. Chapter II, comprising Articles 4 to 8, provides for the assessment of applications for international protection, a term which includes subsidiary protection (see Article 2(g)). These articles deal both with applications for refugee status and for subsidiary protection.

39. Article 4.1 provides:

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

40. Article 4.3(a) requires that account be taken on an individual basis of *"all relevant facts as they relate to the country of origin at the time of taking a decision on the application…"* Article 4.4 provides:

"The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

41. Article 6 provides :

"Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7."

42. Article 15, which occurs in Chapter V, defines the term "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."

43. Article 18 provides that:

"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."

44. Article 38.1 provides:

"The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006 . They shall forthwith inform the Commission thereof."

As we have seen, Ireland complied with this obligation by the adoption of the Regulations on 9th October 2006.

45. The Directive, insofar as concerns subsidiary protection, is expressed in general terms. It does not refer to or attach its obligations to any particular administrative or legal acts or decisions of the Member States. The mandatory obligation expressed in Article 18 is to grant subsidiary protection to a person eligible for it. In effect, to be eligible, a person who does not qualify for the status of a refugee must be able to *"show substantial grounds for believing that*" he or she would *"would face a real risk of suffering serious harm,"* as defined by Article 15, if returned to his or her country of origin.

46. The real underlying issue which arises where a deportation order had already been made, though not enforced, and where the complaint of risk of serious harm had already been considered prior to the entry into force of the transposing regulations, is whether the application for subsidiary protection must be considered anew, by reopening consideration of the deportation order.

47. Before that matter can be considered finally, it is necessary to consider the terms of the Regulations and the manner in which they give effect to the Directive as required by Article 38.

The Regulations

48. Regulation 2 contains a number of important definitions. For the most part, these follow closely the wording of the Directive. Some of the more important are:

"person eligible for subsidiary protection" means a person—

(a) who is not a national of a Member State,

(b) who does not qualify as a refugee,

(c) in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in these regulations,

(d) [Not relevant]

(e) is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

"protection" (except in the definition of "protection against persecution or serious harm") means protection as a refugee or as a person eligible for subsidiary protection in the State;

"protection applicant" means a person who has made an application for protection in the State and whose application has not been—

(a) determined,

(b) withdrawn or deemed to be withdrawn, or

(c) transferred to another country;

"protection decision" has the meaning given to it by Regulation 3, and "protection decision-maker" shall be construed accordingly;

"serious harm" consists of—

(a) death penalty or execution,

(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.

49. It is clear from the foregoing that the terms, *"person eligible for subsidiary protection"* and *"serious harm"* are defined so as to reflect very closely the wording of the Directive.

50. Regulation 2(2) provides in addition:

"A word or expression that is used in these Regulations and is also used in the Council Directive shall have in these Regulations the same meaning as it has in the Council Directive unless the contrary intention appears."

51. Regulation 3 defines the scope of application of the Regulations. It provides:

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).

52. For the purposes of the present appeal, only paragraph (c), relating to a proposal to make a deportation order, is relevant. The intention is clear: in future, that is from 10th October 2006, every subject of a deportation order which the Minister proposes to make after that date is guaranteed the right to make prior representations to the Minister that he or she runs the risk of exposure to serious harm if deported to the country of origin. On the other hand, persons against whom deportation orders have been made and notified, though not yet in fact deported are not accorded that right. The paragraph makes no provision for cases of deportation orders made before 10th October 2006, but not yet notified. Section 3(3)(b)(ii) of the Act of 1999 obliges the Minister to *"notify the person in writing of his or her decision and of the reasons for it..."* This omission gave rise to complex argument in N.H. to which I refer later.

53. Regulation 4 follows the principle of Regulation 3(c). It regulates the scope of the right to make an application for subsidiary protection. The application is made to the Minister. Where the Minister determines that the applicant is eligible for subsidiary protection he is required, pursuant to Regulation 4(4), to grant to the person *"permission to remain in the State."* This provision gives effect, in Irish law, to the requirement of Article 18 of the Directive. It is, therefore, of crucial importance to identify the persons entitled to apply for subsidiary protection.

54. Regulation 4(1) and (2) provide:

> *(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).*

55. Regulation 4(1) imposes a positive obligation on the Minister, but its area of application is limited to cases of deportation orders which the Minister proposes to make after 10th October 2006. As I have said at paragraph 54, it makes no provision for deportation orders already made but not notified.

56. As stated earlier in this judgment, the Minister made the three deportation orders in respect of the appellants on 23rd November 2005, which was prior to the coming into operation of the Regulations. He gave notice of these orders on 29th November 2006.

Section 3(3) of the Immigration Act, 1999 obliges the Minister to give notice in writing of a proposal to make a deportation order. The appellants were properly notified. Regulation 4(1)(a) of the Regulations applies only to a *notification* of such a proposal. The wording of that provision is capable of applying only to such notifications given after the coming into operation of the Regulations, i.e. after 10th October 2006.

57. Section 3(2) (f) of the Act of 1999 applies to *"a person whose application for asylum has been refused by the Minister."* Regulation 4(2) expresses a negative proposition: it specifies what the Minister is not obliged to do. It contains no words purporting to confer any positive power or discretion on the Minister. It is the centre of the issue under consideration. Before proceeding further, it is best to consider the judgment of Feeney J in *N.H. v MJELR,* which is the source of the proposition that Regulation 4(2)the Regulations confers a discretion on the Minister to consider applications for subsidiary protection from persons other than those to whom Regulation 4(1)(a).

58. Feeney J held that the Minister was not *obliged* to consider applications from persons who were subject to a deportation order made prior to the 10th October, 2006, and that persons who had fully pursued an earlier application for subsidiary protection did not have an automatic right to a fresh consideration in disregard of the earlier decision. Furthermore, he expressed the view, at page 475, that the Council Directive *"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."*

59. However, he held, at the same page, that Regulation 4(2) *"gives the respondent a discretion to consider applications for subsidiary protection."* He continued:

> *"Regulation 4(2) reserves an implicit discretion to the respondent to consider other applications. Under that regulation, the respondent is entitled to consider applications from individuals other than persons automatically entitled to apply for subsidiary protection."*

60. At another point, at page 477, he said:

> *"There is no entitlement to any fresh consideration and the Directive does not require such but the respondent has an* ***express*** *power to allow same." (emphasis added).*

In spite of the latter reference to an "express power," I think it is clear that the learned judge intended at all times to state that the Minister has a discretion, to be implied from the terms of Regulation 4(2), to grant subsidiary protection in cases other than those included in the express obligation imposed on the Minister by Regulation 4(1)(a). On any view, there is no express power to consider other cases.

61. The learned judge was at pains to emphasise that the ministerial discretion in question would arise only where an applicant was able to identify fresh or new facts or

circumstances *"which demonstrate a change or alteration from what was the position at the time that the deportation order was made."* He explained further:

> *"Those altered circumstances could include a claim that their personal position is affected by the Directive's 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 respondent, 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 respondent exercise his discretion."*

62. In deference to an extremely closely reasoned judgment, it is important to identify the steps which led the learned judge to the conclusion that Regulation 4(2) confers an implied power or discretion on the Minister.

63. Feeney J held, at page 476, that Regulation 3, *"correctly and properly incorporates into Irish law the requirements of the Directive,"* and that it *"identifies how the obligations under the Directive of 2004 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."*

64. To understand his conclusion on Article 4(2), it is necessary to refer to his account of the position taken by the Minister as respondent in that case. The learned judge noted (see page 456, par.4; 458, par. 10) the position of the Minister to the effect that the Regulations had no application to persons such as the applicants in that case in respect of whom deportation orders had been made and notified prior to 10th October 2006. He noted, at page 473, the submission of the Minister to the effect that Regulation 3 was not applicable in cases where a deportation order had been made made by him before the coming into operation of the Regulations. Thus, insofar as case of the present appellants is legally and factually identical, the Minister did not concede that Article 4(2) applied.

65. The Minister submitted that, in the event of any danger to either of the applicants based on a showing of fresh facts and circumstances, *"any danger…can be met by the making of an application pursuant to s. 17(7) [of the Refugee Act, 1996]."* (par. 12, page 459 and par. 20, page 461/2). That would permit a fresh application for refugee status to be made with the consent of the Minister.

66. Having quoted Article 3 of the Regulation, Feeney J continued:

> *"That section [from the context, he was clearly referring to Regulation 3, rather than any section] makes it clear that the Regulations of 2006 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 reg. 3. If that is so, the Regulations of 2006 do not apply to a deportation order made prior to the 10th October, 2006.*

67. However, the only "decision" listed in Regulation 3 of possible relevance to a case such as the present (as well as to the two cases before the High Court in N.H.) is the notification to make a deportation order. It seems to me that in the second sentence of that paragraph, the learned judge can only be referring to a deportation order made *after* 10th October 2006 in cases where the notification of the intention to make it was given prior to that date. Possibly, the learned judge was of the opinion that, in such cases, there would have to be a fresh notification and that the Minister could not simply make a deportation order after the Regulations came into operation without complying with Regulation 4(1)(a). At any event, that situation has not arisen either in that case or in this.

68. Feeney J considered the Minister's position to be "anomalous." He gives his reason at par 21, page 462. It is best to set that paragraph out in full:

> *"The anomalous nature of the approach adopted on behalf of the respondent is demonstrated by the fact that if the second applicant 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 respondent prior to that date, an application for subsidiary protection would be entertained. The basis upon which it is claimed that the respondent can accept applications for subsidiary relief under the Regulations of 2006 for persons against whom deportation orders have been made prior to the 6th October, 2006, but who have not been informed of the making of such order is reliance on reg. 4(2) of the Regulations of 2006. That section reads:- [Article 4(2) is then quoted.]*
>
> ***It is claimed on behalf of the respondent that there is an implicit discretion reserved by that section to the respondent 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 him 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 respondent 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 reg. 4(2) of the Regulations of 2006 does not and cannot extend to persons such as these applicants."*
>
> The underlined words are the source of the argument that the Minister conceded the interpretation of Article 4(2) for which the appellant argues. Incidentally, the references to 6th October 2006 should presumably read 10th October.

69. Ultimately, the learned judge ruled against the position adopted by the Minister in that case, saying that *"by relying solely on reg. 3 and without reference to the discretion that*

the respondent had under reg. 4(2), [he had failed] *to recognise the discretion that he has to consider applications from persons other that those automatically entitled to apply for subsidiary protection under reg. 3."*

Submissions on the appeal

70. The appellants strongly support the interpretation of Regulation 4(2) laid down by Feeney J in *N.H. v MJELR*. They say that Article 18 of the Directive contains no temporal limitation and that it would have been simple to exclude deportation orders already made. There is a continuing obligation to grant subsidiary protection. That interpretation does not entail any element of retrospectively (*Carmody v Minister for Justice* [2005] IEHC 10, per LaffoyJ). It is at the time of execution of the deportation order that any risk of breach of human rights arises. They argue that the words, *"shall not be obliged to consider"* in Regulation 4(2) clearly encompasses a residual discretion for cases other than the ones the Minister is obliged to consider. The words used permit the Minister to consider an application on a non-obligatory basis. The essence of the written submissions of the appellants was that the Minister had a discretion of the sort described by Feeney J in *N.H. v MJELR*. It would be used in a very small number of cases. In the majority of cases the deportation order would stand.

71. In oral argument, Mr. Michael O'Higgins Senior Counsel for the appellants developed a further argument based on the interpretation of the Regulations in conformity with the Directive. He submitted that the provisions of Article 4.4 of the Directive were novel in that they introduced a presumption that prior suffering of serious harm or threats of the same would be *"a serious indication of the applicant's well-founded fear of......real risk of suffering serious harm."* He pointed out, in addition, that Regulation 3(1)(d) includes in the decisions to which the Regulations apply *"a determination by the Minister under Regulation 4(4)..."* A determination under Regulation 4(4) is a determination that a person is *"eligible for subsidiary protection..."* Therefore, under the latter provision, the Minister is obliged to grant subsidiary protection.

72. The Minister made written submissions, firstly, regarding the Directive and, secondly, regarding the Regulations He submits that the Directive did not have and was not intended to have any retrospective effect. It applied new minimum standards but did not purport to backdate these new standards to decisions already made. He also made submissions, apparently based on an interpretation of *travaux préparatoires,* in support of this view. I do not propose to deal with this issue, as I consider that it does not arise. There can certainly be an argument as to whether the Directive, as properly interpreted, can affect persons in respect of whom deportation orders have already been made. However, that is a matter for interpretation of the Directive. The written submissions of the Minister do not produce any preparatory document which casts any light on this point. Turning to the Regulations, the Minister submits that they set out the only method in Irish law under which a third-country national can apply for subsidiary protection. Nowhere in Regulation 4 or elsewhere is there any provision conferring a right on a person to make an application for subsidiary protection at any other point than when the Minister gives

notice pursuant to Regulation 4(1)(a). Furthermore, Regulation 4(2) limits the category of persons who may apply for subsidiary protection.

Consideration of the issues

73. I propose to consider, in the first instance, whether the Regulations confer a right upon persons such as the appellants to apply to the Minister for subsidiary protection. Put otherwise, do the Regulations oblige the Minister to consider such an application for subsidiary protection? It is important to emphasise that these appeals arise solely in the context of the Regulations of 2006 and, to the extent that it is relevant, the Council Directive which they transpose. The appeals are not related in any way to the exercise of any other statutory power, such as that conferred by section 17(7) of the Refugee Act, 1996, which was advanced by the Minister in *N.H. v MJELR*. Nor, it should be emphasised does this appeal concern the exercise through the Minister by the State of the general executive or sovereign power of the State with regard to the admission of persons of other nationality into the State. I will express no views on these matters.

74. I propose to consider the Regulations in their own terms and, to begin with, to ignore the broader issues relating to the Directive, except to the extent that the terms of the Directive are imported expressly or implicitly into the Regulations.

75. In my view, Regulation 3 is crucial and clear in its own terms. It limits the scope of application of the Regulations. It provides that the Regulations *"apply to the following decisions,"* which it then specifies. For the purposes of the present case, it is crucial that it limits the scope of the Regulations to cases described in Regulation 3(1)(c) where *"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"* is communicated after 10th October 2006.

76. That limitation is itself closely related to the content of Regulation 4(1)(a) which obliges the Minister to give a specific type of notice to persons to whom he communicates notifications of the kind mentioned on Article 3(1)(c).

77. Leaving aside the question of the scope of Regulation 3, and looking at the wording of Regulation 4(2) itself, one must ask by what words that provision confers on the Minister the discretion to consider applications from persons other than those affected by the decisions listed in Regulation 3, or other than persons expressly entitled to notice from the Minister pursuant to Regulation 4(1)(a).

78. To begin with, it seems obvious that Paragraphs (1) and (2) of Regulation 4 must be read together. Paragraph (1) deals with a notification being given to a person to whom section 3(2)(f) of the Act of 1999 applies. It obliges the Minister to include in that notification notice of the right to make an application for subsidiary protection. Paragraph (2) adds that the Minister is not obliged to consider an application for subsidiary protection from any person other than one to whom that provision applies. The same applies *pari passu* to

the provision regarding persons who have not completed the form provided in Schedule 1 and referred to in Regulation 4(1)(b). This appears to me to be a clear, complete and logical scheme. The three provisions interlock and complement each other.

79. I can find no language in Regulation 4(2) conferring on the Minister, either expressly or implicitly, any discretion to consider applications for subsidiary protection in cases not provided for. The paragraph is negative in form: it says what the Minister is not obliged to do.

80. I have come to the conclusion that the interpretation of Regulation 4(2) by Feeney J in *N.H. v MJELR* and hence by a number of other judges of the High Court was erroneous. I do not find any basis in the language of that provision, read either alone or together with related provisions which can justify the implication of a power. What is at issue here is not an obligation for the Minister but a discretionary power. What is more, as explained, it is a discretion limited to cases where the Minister accepts that new facts or altered circumstances have been shown to have arisen. That is a large edifice to build on the words, *"shall* ***not*** *be obliged."(*emphasis added), the words of the Regulations said to convey that power.

81. Nor am I persuaded by either of Mr. O'Higgins' additional arguments advanced at the oral hearing. Article 4.4 of the Directive certainly provides that previous incidents of "serious harm" or threats to the same effect, are to be treated as a "serious indication" of a "real risk of suffering serious harm." Firstly, this adds nothing to the argument based on the wording of Article 4(2). Secondly, the history of every stage of the asylum and immigration history of the appellants shows that the history of Elizabeth, the daughter of Mrs. Izevbekhai, has been accepted without question. I do not think that the inclusion of a determination by the Minister under Regulation 4(4) of the Regulation in the decisions which, pursuant to Regulation 3, the Regulations apply has the effect contended for. Regulation 4(4) obliges the Minister to grant subsidiary protection to any person who he has determined to be eligible for subsidiary protection. Regulation 3(1)(d) does not determine eligibility for subsidiary protection. Its reference to Regulation 4(4) does not alter that fact. The proposition can be tested by reference to the inclusion of a notification to make a deportation order in Regulation 3(1)(c), which does not determine eligibility. That can occur only following the notification procedure laid down in Regulation 4(1)(a) and a subsequent acceptance by the Minister of representations made.

82. It remains to consider whether the general obligation of conforming interpretation which is incumbent on the courts of the Member States would alter the primary conclusion, which is that the Regulations do not confer the suggested power or discretion on the Minister. The Court of Justice has consistently laid down that principle since its decision in Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891. Counsel for the appellants relies, in particular, on the later decision in *Case C-106/89 Marleasing SA v. La Comercial de Alimentacion SA* [1990] ECR I-4135, where the court explained the principle in the following terms:

"With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and, consequently a provision of a directive may not be relied upon as such against such a person ....

However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 Von Colson and Kamann v. Land Nordhein - Westfalen [19844] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby with the third paragraph of Article 189 of the Treaty.

It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question."

83. As that passage explains, the obligation requires interpretation of national law in the light of the directive being implemented *"a far as possible."* This has been explained more fully in the context of the implementation of a Framework Decision in Case C-105/03 *Pupino* [2005] E.C.R. 1-5285:

"The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law contra legem. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision."

84. In order to be able to apply these principles the Court to compare the provisions of the Regulations with those of the Directive. The Court has not been referred to any particular provision of the former which, by application of the principle of conforming interpretation, and its consequent interpretation in any particular way would achieve the result mandated by the Directive. It seems to me that Article 18 of the Directive is directly and clearly implemented by Regulation 4(4): the former requires the Member States to *"grant subsidiary protection"* to eligible persons; the latter 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."*

85. Is there anything, therefore, in the rules or procedures whereby the Minister determines who is eligible for subsidiary protection which, by interpretation in the light of the Directive, would lead to the Minister necessarily having discretion effectively to reopen a determination already made? Firstly, the definition of *"person eligible for subsidiary protection"* set of in Regulation 2(1) reflects precisely that laid down in Article 2(e) of the Directive. The operative provisions of Regulations 3 and 4 provide that an order cannot be made for the deportation of a person from the State without an opportunity being provided to make representations that the person is eligible for subsidiary protection. All this is in strict conformity with the terms of the Directive.

86. In the final analysis, the appellants support the interpretation of Regulation 4(2) adopted in the High Court decisions since *N.H. v MJELR*. That is that the Minister, while not obliged to reconsider deportation orders made prior to the entry into force of the Regulations, has a discretion to do so in the limited circumstances that the person subject to that order can point to new facts or altered circumstances which now justify the grant of subsidiary protection, even though the facts at the time the order was made did not support such a conclusion. The appellants have not pointed to any provision of the Directive which requires the Member States to adopt any such provision. The Directive does not address at all the status of prior deportation orders. It does not concern itself with any particular national or administrative procedures. It confers a right as from 10th October 2006 to be considered for subsidiary protection on the defined category of persons. It says nothing about persons who have received such consideration prior to that date. It is not contended in the present case that the State has failed in its obligation to transpose the Directive correctly into Irish law.

87. I would also express this conclusion in slightly different terms. There are two possible sources of the proposition that the Minister has a discretion to reopen deportation orders already made: one in national law (the Regulations); the other in the law of the European Union. Neither contains any provision requiring Member States to act in the manner contended for.

88. For these reasons, I would hold that Regulation 4(2) of European Communities (Eligibility for Protection) Regulations (S. I. No. 518) 2006 does not confer on the Minister discretion to reopen or reconsider deportation orders made prior to 10th October 2006 in response to an application from the subject of such an order for subsidiary protection.