[2008] IEHC 107

The HIGH COURT

JUDICIAL REVIEW

[2007 No. 1432 J.R]

BETWEEN

FR. N., UYO. E. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND FR. N.) AND OB. E. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND FR. N.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

[2007 No. 1528 J.R]

IN THE MATTER OF THE REFUGEES ACT, 1996 (AS AMENDED) IN THE MATTER OF THE IMMIGRATION ACT, 1999 (AS AMENDED), IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000, IN THE MATTER OF THE EUROPEAN COMMUNITIES (ELIGIBILITY FOR PROTECTION) REGULATIONS 2006, AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 SECTION 3(1) BETWEEN EDE. EM., OS. EM. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND EDE. EM.) AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

[2007 No. 1641 J.R]

BETWEEN

SUSAN O.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Charleton J. delivered on the 24th day of April, 2008

1. All of the applicants are persons who have come from Nigeria to Ireland and who have unsuccessfully claimed to be refugees from persecution as defined by s. 2 of the Refugee Act 1996, as amended. None of them are in possession of passports or national identity documents. At the conclusion of the statutory process whereby a declaration of refugee status might have been made in their favour, all of them were written to by the respondent Minister, pursuant to his obligation under s. 3 of the Immigration Act 1999, asking them for representations as to why they should not be deported. Council Directive 2004/83/EC of the 29 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, O.J. L30A/12 30.9.2004, (the subsidiary protection Directive),

was brought into force in Irish law by virtue of the European Communities (Eligibility for Protection) Regulations 2006, S.I. number 518 of 2006. The applicants were also written to on or after the 10th October, 2006, the date on which the aforementioned legislation came into force, asking them whether they were seeking subsidiary protection and seeking representations on that account as well. In response, representations from the several applicants for subsidiary protection were made. This status was subsequently refused by the respondent Minister in respect of all of them. In essence, the several applicants argue that the decision by the respondent Minister to refuse to grant them subsidiary protection was made by a procedure which was in breach of their rights. The correct procedure, they argue, that must be applied where an issue arises as to whether a failed asylum seeker is entitled to subsidiary protection is one which is equivalent to the statutory mechanism for the granting of a declaration of refugee status under the Refugee Act 1996, as amended. Further, it is argued that this court in reviewing the decisions of the respondent Minister refusing subsidiary protection should apply the case law of the Superior Courts applicable to refusals of refugee status and not merely the principles which the courts have worked out in respect of the discretionary power of the respondent Minister to allow a failed asylum seeker to stay in Ireland on humane grounds and in respect of the duty of the respondent Minister to uphold the principle of non-refoulement.

2. All the parties accept that an application for subsidiary protection cannot be made before the Refugee Applications Commissioner, and nor can a refusal of such protection be appealed to the Refugee Appeals Tribunal; such an application can only be made to the respondent Minister. The applicants argue, however, that the nature of the rights involved in subsidiary protection imply equivalent levels of protection by way of the procedures that the respondent Minister must apply in determining

subsidiary protection status, insofar as that is possible, and that there should be an equivalent scrutiny in terms of the review that this court should apply to the decisions of the respondent Minister in that regard. The respondent Minister has argued that the availability of the right of subsidiary protection to people such as the applicants, is one which can, and should, be decided by an administrative procedure following upon the conclusion of a failed application for refugee status and which concerns itself essentially with the circumstances of the applicant and as to whether, in that regard, any case is made out by an applicant that the situation within their country of origin is such as to require the State to offer them subsidiary protection. The respondent Minister contends that, as all of the applicants are failed asylum seekers, the nature of the review of his decisions by this court should therefore be equivalent to that applicable in the prohibition of refoulement and refusal of leave to remain in Ireland on humanitarian grounds cases.

3. This court is not entitled to decide cases on the basis of hypothetical sets of facts. It is therefore important to refer to the individual circumstances of each set of applicants before turning to the law and considering its applicability to them. The applicant Fr. N. is joined in this case by her son and daughter, none of whom are Irish citizens. The applicant Ede. Em. is joined by her son, who is not an Irish citizen. The applicant Susan O. does not have any children who are joining in this application.

N.: The Process

4. Before the Refugee Applications Commissioner and before the Refugee Appeals Tribunal, these applicants claimed that they feared persecution in Nigeria because the family of Ms. N. wanted her to be the head of an occult shrine and to have her daughter circumcised through female genital mutilation. On the death of her

father, she claimed, her family advised her that she should now become head of this shrine. She claimed that she did not want to. The applicant stated that she was beaten and had her leg broken because of her refusal to comply with these demands. She did not remember the date of her father's burial. Her father, she claimed, died on the 22nd January, 2004, and she departed from Nigeria on the 27th July, 2005. She claimed that she was subjected to threats from shrine and family members, but she did not claim that the Nigerian authorities had anything to do with any attempt at intimidating her. Leaving three other daughters behind in Nigeria, she left with one of the applicants. The Commissioner commented as to the applicant that her "replies were vague in relation to timing of events which she would have been expected to know." She added: " In the opinion of this examiner the applicant's claim is not credible, she had therefore not demonstrated a well founded fear of persecution." The Refugee Appeals Tribunal found that the applicant did not know what religious activities went on within the shrine; she had indicated that these involved sacrifice, the mixing of blood to drink and the killing of dogs and dancing. She claimed that if she returned to Nigeria she would be killed. When she was asked as to why she had only brought one of her three daughters with her, fearing they might all suffer female genital mutilation, she said it was because they were sleeping.

5. It is not for this Court to find facts, as I have not seen or heard any of the applicants. In the N. case, a wide range of facts were alleged which were not accepted on appeal. In analysing the claim, the Tribunal commented as follows:

> "A. The applicant said that her leg had been broken by her own family on 14th November, 2004. At p. 13 of the interview the applicant stated that her husband and she were together when they made the police report. She did not go to the hospital because "when you have injury on legs,

they can also do it at home. They invite the Doctor, while I was at the home of church members". In her direct evidence at the hearing the applicant said she went from the police station to the hospital with friends and church members. She said she could not stay there. The Tribunal is of the opinion that it would have been reasonable to have sought and obtained a medical report from the hospital verifying the facts as outlined by the applicant, particularly since the applicant had obtained a photocopied record of the alleged assault.

B. The Tribunal does not find credible the applicant's claim that she spent six-months in the home of her church leader without contacting her children's school, or making any efforts personally to ascertain their whereabouts despite threats for circumcision from the applicant's own family. It is not credible that the applicant would have abandoned her daughters and moved to a different continent if there was any genuine threat.

C. The detail given by the applicant of the practices of the [occult] society varied extravagantly each time she gave an account. Yet when she was asked directly what religious activities went on in the society she said she was not there herself. It is reasonable therefore to infer that her flamboyant descriptions are conjecture.

D. The Tribunal is not satisfied that the applicant has provided a full and true explanation of how she travelled to and arrived in the State. She did not produce passports or documents of identity for her children and herself at the airport, and was deliberately vague and unresponsive when questioned about passports.

E. The applicant and her husband and family come from Benin City, Edo State, which is one of eight states in Nigeria where [female genital mutilation(FGM)]is prohibited by law. The Nigerian government publicly opposes FGM and campaigns have been conducted through the Ministry of Health and the media. A draft Bill outlawing FGM has been before the National Assembly since 2001. The joint British/Danish fact finding mission to Abuja and Lagos published by the Danish immigration service in January, 2005 states at para. 3.9.6 that it was the opinion of the Nigeria Women's NGO, BAOBAB, that FGM in itself is not a genuine reason for applying for asylum abroad. The situation regarding FGM in general has improved significantly. Government institutions and NGOs afford protection to women who do not wish to undergo FGM and most women throughout Nigeria have the option to relocate to another location if there is pressure from her family. According to the Nigeria Country Report (April 2004) the cultural nature of the practice in Nigeria determines that the mothers of young daughters are able to veto treatment if they oppose it. Communities from all of Nigeria's major ethnic groups and religions practise FGM, though adherence is neither universal nor nationwide."

6. On the 6th December, 2006, the solicitors on behalf of the N. applicants applied to the respondent Minister in writing for subsidiary protection and enclosed certain country of origin information documents and a number of medical reports. The medical report as to Ms. N.'s physical state indicates that she is attending counselling and is distressed and depressed. It says that her ankle is painful and will require orthopaedic follow-up and treatment and that she has difficult walking for

more than a short distance without pain. An x-ray of her left ankle confirms a healed fracture of the tibia and fibula consistent with the time frame of physical abuse alleged by her. A report as to her psychological condition, and following a general examination, indicated that the applicant was herself a victim of female circumcision by tribal practice, as were some ninety per cent of her tribe in her age group, and contends that she had fled in consequence of that. She is recorded as having described an assault with multiple lacerations from broken glass across her back and chest areas and a bite on her breast. The relevant doctor was able to state that she could identify tribal scars and distinguish them from trauma scars and that the nature of the relevant scars was consistent with injuries from a sharp object, such as broken glass, leaving wounds which healed naturally. Her psychological state was assessed as being traumatised and the doctor reported that she feared returning to the jurisdiction of Nigeria and her village community, in which case, "her prognosis should be very guarded in respect to her mental state".

7. By letter dated the 31st July, 2007, the respondent Minister wrote to Ms. N. indicating that the Minister had determined that neither she nor her young son or daughter were eligible for subsidiary protection. This letter enclosed a copy of the report setting out the Minister's determination. That report was compiled by two officials of the respondent Minster and was decided upon by an Assistant Principal Officer who gave evidence before the court. I regard that evidence as truthful and reliable. Dermot F. Cassidy, the relevant official, indicated that he read the entire the application on behalf of the N. applicants and the analysis that had previously been made of the relevant file by his officials. He perused the information attached to the application for subsidiary protection paying particular attention to country of origin information where it concerned female genital mutilation. This perusal was made in

the context of being very familiar with the relevant country of origin information. He stated that he was not in a position to speak specifically about medical reports but, as a matter of good practice, such reports were given good consideration by his staff and by him. He said that all issues put forward by the applicant's solicitor would, as a matter of course, be considered. He did not, however, recall this particular application, but said that all arguments in these cases would be considered and that such questions would not be "just left out to dry". He did not personally consider the file before the Refugee Applications Commissioner or the Refugee Appeals Tribunal. He regarded himself as being practised in reading a document and finding out what it was about. A central issue for him in reading the documentation was to see if the staff under him had correctly weighed up the balance in the report prepared for the purposes of making a decision.

8. I do not intend to set out the decision document in this judgment. It is a fair appraisal of the application made. In effect, it goes through the entire of the application previously made in the refugee process again and concludes that there is nothing in it, or in any of the new documents supplied to the Minister, which indicated that the applicant was eligible for subsidiary protection. A fair analysis is also made in the report of country of origin information.

Em.: The Process

9. In these cases it was claimed before the Refugee Applications Commissioner that a woman known as 'Madam Iron Lady' came to the parents of the adult applicant and offered to bring her to Italy to work in a factory. She agreed to go. Ms. Em. claimed to have taken an oath at a pagan shrine that she would repay her travel expenses to this woman and that she would not run away. She claimed to have left

Nigeria on the 14th April, 2005, arriving in Rome on the next day. In Italy, the applicant claimed that she was forced to take another occult oath to pay this woman €60,000 and was then locked in a room and tortured until she agreed to work as a prostitute. After nine months of captivity she claimed to have become pregnant and was brought by Madam Iron Lady to a house to undergo an abortion. She claimed to have escaped from this house when she pretended to go to the toilet and ran away. Then she claimed to have met a man from Cameroon who brought her to the train station and put her on a train to Austria where she remained from December, 2005 to March, 2006.

10. In Austria, she claimed to have met a man from Ghana who let her stay with him and introduced her to a man called Patrick who brought her to Belfast and then to Dublin. Her baby is also an applicant in this case. On her case the Refugee Applications Commissioner commented as follows:

> "The applicant claims that she cannot return to Nigeria as she took an oath and were she to return she "will go mad or die"... This aspect of her claim is fundamentally lacking credibility. Furthermore, when it was pointed out to her at interview that she has already run away, in breach of this promise, she referred to the other part of the oath whereby she promised to pay her travel expenses. She then alluded to the second oath that she was allegedly forced to take in Italy to pay €60,000 and work as a prostitute... It is hard to believe that the applicant cannot return to Nigeria on the basis of either of these oaths... The applicant also failed to offer a reasonable explanation as to why she did not report this woman to the police which seriously undermines the veracity of her claim... It is also difficult to accept that

during the course of her 'escape', three men whom she had never met before made arrangements for her to travel to Austria and then to Ireland without asking for any money in return... Additionally, the applicant was unable to give a reasonable explanation as to how 'Madam Iron Lady' would know [where] to find her in Austria... It is incredible that the applicant would spend three months in Austria and remain indoors the entire time thus being unable to apply for asylum there... The established standard of proof in asylum claims is whether there is a real or reasonable chance that the applicant would face persecution should she return to her country of origin. Given the implausibility of the applicant's claim that she would 'go mad or die' were she'd return to Nigeria there is no objective basis to her claim in any known fact."

11. On appeal before the Refugee Appeals Tribunal this applicant's case was rejected. The decision indicated the following:

"Even if we accept that there is a genuine fear in the mind of the applicant, there has to be a valid basis for that fear. The applicant fears returning to Nigeria because she maintains she was duped into travelling to Italy with Madam Iron Lady, having first taken an oath at a shrine and promising not to flee and a subsequent oath on her arrival in Italy, promising to repay this woman the sum of €60,000 in travelling expenses. It is not accepted that that there is a valid basis for the fear the applicant alleges having... Her fear relates a fear of breaking an oath which would result in her death or going mad. While the applicant may well believe in the power of the shrine and the oath

> she took, it is quite clear that there is not a valid basis for that fear in that the breaking of an oath not to run away and to repay money could not cause a person to die or go mad. The fact that the applicant believes this to be the case does not mean that it is in fact the case. Indeed, given that she broke the first oath and ran away and nothing untoward happened to her (i.e. she didn't go mad or die) would seem to suggest that she has little cause for concern in that regard. Thus it is clear there is not a valid basis for the fear she alleges having."

12. The second Em. applicant made applications in similar terms and was refused on similar terms. On the conclusion of this process of applying for asylum, a letter was written by the respondent Minister to these applicants seeking submissions in relation to deportation and on the issue of subsidiary protection. An application for subsidiary protection was made on behalf of both Em. applicants on the 29th May, 2007. The case was made that the applicant feared to return to Nigeria because Madam Iron Lady would track her down and kill her because she broke the two oaths and that she owed her a substantial amount of money. The application refers to country of origin information and that is enclosed with her solicitor's letter seeking subsidiary protection.

13. By a letter dated the 16th October, 2007, the respondent Minister refused the application for subsidiary protection and enclosed the report setting out the Minister's determination. This report analyses the documentation received and, in addition, refers to three reports on country of origin information which had not been sent by these applicants to the Minister. At the core of the decision is a determination that, on the information provided, there was nothing which would prevent the applicant from seeking protection from the authorities in Nigeria on her return. The report also

comments adversely on her credibility. The report was prepared by two officers of the respondent Minister and was decided upon by Lorena M. Gradwell, an Assistant Principal in the respondent Minister's department. She gave evidence before this court. I find her evidence to be truthful and reliable. Ms. Gradwell told the court that it was her practice to ensure that the case processor uses the most up to date country of origin information. I infer that she regarded it as the responsibility of the department to ensure that out of date information was not used. She told the court that she read the application and the documentation. This included the Refugee Applications Commissioner decision, the Refugee Appeals Tribunal decision, the submission by the Executive Officer and the letter and documentation supplied by the applicant. She regarded it as her task to read the details of the application and ensure that these are fully set out in the report. If necessary, she said, she would speak to the relevant member of her staff, sometimes photocopying the reports from the refugee applications process and highlighting matters. She regarded it as her duty to ask herself the question: "are there substantial grounds for believing this person would be subjected to serious harm if returned to the country of origin?" She told the court that she never "just signed off on a report". She indicated that it was not the current practice of the respondent Minister's department to return to the applicant's solicitor and seek further submissions or information.

14. One of the documents put before the respondent Minister was a letter from a particular Community Church which indicated that the applicant had been in frequent attendance at church meetings and had not caused any problems, been quiet and had not involved herself in other people's business. It also states:

> "... May I plead on her behalf that you reconsider her case in the light of the fact that she now has a son... who was born here in Ireland, and

> that her closest relatives, who would offer her practical support in bringing up her son, live in [location redacted]."

The analysis in the report constitutes a fair summary of the relevant issues and a fair appraisal of relevant country of origin information.

O.: The Process

15. The claim made before the Refugee Applications Commissioner by Ms. O. was that the applicant had left Nigeria on the 27th April, 2006, and travelled to Milano in Italy with a woman called Madam Vivian. This woman made the applicant work as a prostitute in Italy. However, she asserted that she was apparently fortunate in that one client of the brothel helped her to escape to Ireland about three weeks later, where she claimed asylum on the 15th May, 2006. On credibility, the Refugee Applications Commissioner made the following comment:

> "The applicant claims that she cannot return to Nigeria as she took an oath at a shrine saying that if she ran away from 'Madam Vivian' she would die... This aspect of her claim was fundamentally lacking credibility. Furthermore when it was pointed out to her at interview that she has already run away, in breach of this promise, she stated that she had been having dreams in which some people wearing masks were chasing her... It is hard to believe that the applicant cannot return to Nigeria on the basis of this oath. The applicant was unable to offer a reasonable explanation as to why she did not report this woman to the police which seriously undermines the veracity of her claim... It is also difficult to accept the applicants account of her escape were she alleges that she explained her situation to one of 'Madam Vivian's' clients

> whom she had never met before and he made all the travel arrangements for her without asking for any money in return... Additionally Ms. O. was unable to give a reasonable explanation as to how Madam Vivian would be able to find her in a country as large and populated as Nigeria...The applicant also claimed that she could not work in Nigeria as "there was no work"...It is hard to believe that the applicant, an educated woman who lives in the city, would not be able to find any work in Nigeria."

16. On this finding being appealed, the Refugee Appeals Tribunal commented that the applicant was vague and lacking in detail about the man who assisted her:

> "It is not capable of belief that in the space of one day that this man should have arranged everything for her travel from Italy to Ireland, including tickets and false passport and that he should accompany her on her journey from Italy to Ireland in return for no favours. The Tribunal is mindful of the fact that the applicant has provided no evidence of her journey to Ireland such as ticket receipts, boarding passes or baggage slips."

17. The Tribunal also commented that the applicant failed to provide any photographic evidence as to her identity from her country of origin and that the surname of her sister in a letter, supposedly sent by her in support of her contentions, differs from the name provided by the applicant in the relevant questionnaire. No detail was given to the Tribunal as to the pagan rituals supposedly relevant to the taking of an oath and, having listened to her evidence, the Tribunal was not prepared to give the applicant the benefit of the doubt. It was not satisfied as to the general credibility of the applicant. The Tribunal was not satisfied that if the applicant were

to return to Nigeria there was any reasonable possibility that she would experience harm but, on the contrary, they held that State protection would be available to her.

18. By letter dated the 27th September, 2007, the respondent Minister refused the application for subsidiary protection and enclosed the report setting out the determination. That report was prepared by the respondent department and the decision maker was Lorena Gradwell. I have the same comment to make with respect to this applicant as I made with regard to the Em. applicants. The reports in both cases were a fair summary of the issues and the process engaged in by the respondent Minister's department was a conscientious one. In the course of the relevant analysis three reports on Nigeria furnished by the applicant were not referred to. The analysis constitutes a fair summary of the relevant issues on country of origin information.

Credibility

19. Section 11(b) of the Refugee Act 1996, as inserted by s. 7(f) of the Immigration Act 2003, states that the Commissioner or the Tribunal, in assessing the credibility of an applicant for the purposes of investigating whether or not they are a refugee, shall have regard to a number of principles. The legislation is unusual in that it provides guidance as to the assessment of fact, as opposed to laying down a rule of law in the event that a particular fact is found. The bodies dealing with applications for refugee status must have regard to whether the applicant possesses a passport or another official national identity document and, if not, whether a reasonable explanation has been provided for the absence of such documents; whether the applicant has provided a reasonable explanation to substantiate that the State is the first safe country in which to make an application for refugee status since departing from their country of origin; whether the applicant has provided a full and true

explanation of travel to the State; whether the applicant claimed asylum immediately on arriving in the State, and if not whether there is a reasonable explanation; whether the applicant has forged, destroyed or disposed of identity documents and if so as to whether there is a reasonable explanation for so doing; and whether the applicant has adduced manifestly false evidence. The principle that the fact finder should consider why an applicant does not have a passport or official national identity card does not mean that a genuine refugee may not have one. However, real proof of identity can allow the statutory bodies to check an applicant's account and it can also mean that rights arising by virtue of marriage to an Irish citizen or European Union national are not nullified by reason of a previous marriage. It should be remembered that it is the duty of a person seeking international protection to assist the State in fairly assessing their application. The sense of the other criteria set out in the section similarly allows for a fair determination as to whether a genuine application is being made.

The court is not, in these judicial review applications entitled to put itself in the shoes of the decider of fact and substitute its own assessment as to credibility for that already arrived at; *Imafu v. Minister for Justice, Equality and Law Reform* (Unreported, Peart J., High Court, 9th December, 2005). The corollary of that is that the court in judicial review applications is not entitled to act as if the applicants have not had facts found against them by the statutory bodies assigned the task of interviewing them and considering their application for refugee status and then determining their appeal, which in these cases was done on the basis of an oral hearing. The assessment of credibility has to be carried out in accordance with the principles of Constitutional justice. Where there is a significant error of fact essential to the decision, either as to its foundations or as buttress to a crucial finding, a

decision can be undermined; *Imafu v. Minister of Justice, Equality and Law Reform* (Unreported Clarke J., High Court, 27th May, 2005).

20. The facts which come before this court are those as stated in relation to each of the applicants. An impressive analysis of the proper approach by an assessor of fact in a refugee claims situation was given by Herbert J. in *Kikumbi v. Refugee Applications Commission* (Unreported, High Court, 7th February, 2007). There is nothing to suggest in these applications that any of the principles set out by Herbert J. were breached the Refugee Applications Commissioner or the Refugee Appeals Tribunal. For the purpose of making an application in writing to the respondent Minister for subsidiary protection each of these applicants, in effect, re-ran the applications which had already been orally made before the Refugee Applications Commissioner and the Refugee Appeals Tribunal. The applicants are not to be faulted in so doing. A central issue, however, is as to whether it is incumbent on the respondent Minister to reassess all of the facts on a basis divorced from the process under the Refugee Act 1996, as amended, that had previously occurred.

Subsidiary Protection

21. Central to the case argued on behalf of all of the applicants is that subsidiary protection is a right which they enjoy in Irish and European law. In contradistinction to a discretion to allow a foreign national to stay in the State, the right to subsidiary protection arises, it is argued, as a matter of right. It is therefore contended that the approach of the High Court to the assessment of rights by administrative bodies is the correct approach to adopt in reviewing the decisions of the respondent Minister to refuse all of the applicants' subsidiary protection. I must turn therefore to the issue of

subsidiary protection as a right and analyse the approach of this court to non-discretionary decisions in the context of international protection.

Prior to the entry into force of the European Communities (Eligibility for Protection) Regulations 2006, upon the making of a determination under the Refugee Act 1996 that an applicant for refugee status was not entitled to a declaration that they were a refugee, if the Minister wanted to consider sending an applicant out of the State, two further matters needed to be considered prior to deporting them. Firstly, the respondent Minister was required to follow the procedure in the Immigration Act, 1999, as amended, by serving the proposed subject of a deportation order with a notification of that proposal and indicating that the person concerned might make representations to the Minister within 15 working days as to why such an order should not be made. In response, what usually happens in practice is that a letter is then sent by an applicant to the Minister asking not to be deported, often with references as to character and documents as to ties of family, work or friendship within Ireland. In determining whether to make an order of deportation, the Minister is obliged, under s. 3 of the Immigration Act, 1999, to have regard to the age of the person; the duration of residence in the State of the person; the family and domestic circumstances of the person; the nature of the person's connection to the State, if any; the employment record of the person; the employment prospects of the person; the character and conduct of the person; humanitarian considerations generally; any representations made on behalf of the person; the common good; and considerations of national security and public policy, "so far as they appear or are known to the Minister". The representations made by the person would, it is to be expected, be considered from the point of view of these guidelines but, the decision of the respondent Minister is discretionary. It often depends on immigration policy, a matter that is solely within

the sphere of legislation and government policy. By virtue of s. 3(6) of the Immigration Act 1999, a person being considered for deportation, has a right to make representations and has a right in addition, that the Minister should consider these in accordance with the relevant legislation. They have, however, no right to stay in Ireland even though they might meet a preponderance of the relevant criteria. The broad ranging nature of the discretion vested in the Minister means that in considering the relevant criteria, he could decide that a particular principle loomed large in a particular case or that it was of little weight. In deciding not to make a deportation order, therefore, the Minister is acting more in the way of conferring a privilege upon a non-citizen within the State, whether or not they were a failed asylum seeker, as appears to be the situation in the vast majority of cases.

22. In addition to that discretion, the Minister is specifically prohibited by what is sometimes called the non-refoulement principle from expelling non-citizens whose rights to life and bodily integrity would thereby be threatened. This is not discretionary and never was. Section 5 of the Refugee Act 1996 provides:

> "5(1) A person shall not be expelled from the State or returned in any manner whatsoever 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 her race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) 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 subject to a serious assault (including a serious assault of a sexual nature)."

23. In contrast to the discretion on humanitarian grounds vested in the respondent Minister under s. 3 of the Immigration Act 1999, s. 5 of the Refugee Act 1996, declares a right in favour of non-citizens. The analysis required thereby is more than the consideration of a discretion as to whether or not a privilege should be granted. Rather, it prohibits expulsion from the State in terms which uphold the life and freedom of non-citizens not to be subjected to the threat of serious assault. The definition of a refugee, as contained in s. 2 of the Refugee Act 1996, overlaps to a major degree with the non-refoulement principle as stated in s. 5 of the Act. A difference arises through the definition of a refugee under s. 2 of the 1996Act, requiring that an applicant should fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; whereas the Minster is forbidden for expelling a non-citizen from the State where, under s. 5 of the 1999 Act, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. It would be fair to assume that the reference to persecution in s. 2 in the 1996 Act is replaced in s. 5 of the 1999 Act by a reasonable risk that a threat to the life or freedom of a person being considered for deportation would arise on that same ground.

24. However, in addition, s. 5(2) declares that a threat can exist where a person is likely to be subjected to serious sexual, or non-sexual, violence. Persecution can arise by virtue of the action of a state, or a group within a state, against an identified group who are hated by reasons of false justifications on the basis of race, religion, nationality, membership of a particular social group or particular political opinion. Section 5 is, because of its somewhat broader definition, arguably not necessarily concerned solely with persecution but with the likelihood of a serious infringement of

a non-citizen's bodily integrity. This will very often occur by reason of persecution, which may be described as impersonal hatred arising from attributes projected onto groups within a society and which leads to violence, but it can also arguably occur due to chaos, lawlessness and the breakdown of State institutions. There is arguably a statutory right vested the sections in non-citizens, not to be returned, by any means, to a place where they are likely to be persecuted and arguably, even absent active persecution, subjected to serious assault. I read the legislation as covering persecution and possibly as covering the risk of serious assault by reason of the state of chaos within a country. The legislation requires the respondent Minister to consider how a proposed deportee may be affected as to this right. Though proposed deportees are not given a statutory opportunity under the legislation to make submissions as to this right on the state of affairs within their country of origin, it is nonetheless a right that is declared by the section. In addition to the right declared by s. 5 of the Refugee Act 1996, there is also the right vested in non-citizens by legislation not to be returned to a country which will subject a non-citizen to torture; the Criminal Justice (United Nations Convention against Torture) Act 2000. This is undoubtedly a right declared in favour of non-citizens and once a person qualifies for the right, no discretion to override that right is vested in the respondent Minister.

25. Under the European Communities (Eligibility for Protection) Regulations 2006, Section 2(1) a person is entitled to subsidiary protection where they are a person:

> "(a) who is not a national of a Member State [of the European Union]
>
> (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) to whom regulation 13 of these regulations does not apply [excluding persons who have committed, war crimes or serious wrongs], and

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

Serious harm is defined as consisting 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".

26. These definitions mirror Articles 7(2) and 15 of Council Directive 2004/83/EC, the subsidiary protection directive. This definition extends the protection that would otherwise have been given as of right in Irish law to non-citizens against expulsion from the State. The 2006 Regulations make it explicit that a threat on account of racism or bigotry by way of persecution is not required, and that the State is obliged to protect a person who may be killed, tortured or seriously threatened as to their life or person through execution, torture or through indiscriminate violence occurring by reason of war or civil war. Rights in favour of non-citizens of Ireland also arose, prior to the transposition of the Directive into Irish law, under the European Convention on Human Rights. The decisions of this court support the principle that circumstances could arise where the court is obliged to

intervene against a decision of the respondent Minister and to declare that such a right prevented deportation. The relevant decisions are considered in the context of the procedures issue in this case and do not need separate consideration here. However, any fair analysis supports the conclusion that the respondent Minister had the responsibility prior to the subsidiary protection Directive to protect actual rights and not merely to consider how he might exercise his discretion as to the granting of a privilege not to deport a non-citizen.

27. Part of the argument of the applicants is that they are entitled to the benefit of the health system in Ireland and that they should not be returned, in the light of the condition of the applicant N. in particular, to Nigeria where much lesser forms of assistance are available. The principle of protection contained in the regulations is against human action. It is not against illness or natural disaster. Nothing in the regulations entitles a person to be aided unless they qualify by virtue of s. 2 of the regulations. For someone to be executed, another person has to arrange for that to happen. Similarly, for someone to be tortured, other people in their country of origin must pursue that inhuman activity. Threats of the most serious kind to life or person can occur in through individual criminal activity or gang warfare. That can happen in Ireland, or in Nigeria, or in any other country and in consequence people are murdered, raped and assaulted. But protection is only afforded under the legislation where this arises from either "situations of international or internal armed conflict" or where there has been such a breakdown of structure within the country of origin that there is no adequate response to violence by reasonable attempts at law enforcement. The legislation is based on a "need for international protection". I am not entitled to construe the relevant definitions outside these parameters and to bring them into the realm of health or welfare.

28. The recitals to Council Directive 2004/83/EC emphasise that no one should be sent back to persecution and that the existing rules regarding refugee status should be complemented by measures on subsidiary forms of protection whereby the Council of the European Union has legislated to establish the territory of the Member States as "an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community"; recitals 1, 2, 5 and 8. Subsidiary protection is not open except where it is genuinely sought by those who are legitimately entitled to it under the relevant definition. Recital 9 makes it clear that compassionate decisions, such as those covered by the Minister's discretion under s. 3 of the Immigration Act 1999, as amended, are not covered by the legislation:

> "Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive."

29. In assisting in defining subsidiary protection under Article 2 of the Directive, recital 26 declares that "Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify a serious harm", a matter reflected in Article 15 in its definition of serious harm and which is copied in s. 2 of the national legislation. Article 7 of the Directive declares that protection can be provided by the country "or organisations, including international organisations, controlling the state or a substantial part of the territory of the state." I am obliged, from this, to conclude that the situation giving rise to the need for international protection under the Directive must be serious if, as the legislation contemplates, those seeking subsidiary protection

can be returned to an area of their country of origin under international control. The fact that such control by another country, or by an international organization, is contemplated emphasises that the Directive is concerned with harm that may occur to people returned to countries where a serious societal breakdown has occurred.

The Directive also obliges Member States to provide protection against an individual threat of execution, torture or serious assault but only where there is no safe place within the country of origin where reasonable measures of protection through criminal justice are in place. Article 7(2) of the Directive, which is reflected in Sections 7 and 8 of the national legislation, provides:

> "Protection is generally provided when the acts as mentioned in paragraph 1, take reasonable steps to prevent the prosecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, persecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection."

30. Article 8(1) provides:

> "As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country."

31. In making these assessments under the Directive, as to whether an international organisation controls a substantial part of the territory of the country from which an applicant comes, or if a part of the country of origin is free of any real

risk to an applicant for subsidiary protection, Member States are required to take into account such guidance as may be provided by the European Council and to have regard to two factors: the general circumstances prevailing in that part of the country of origin and secondly, the personal circumstances of the applicant. . The Directive clearly emphasizes the duty of a person seeking international protection to first look to the authorities in their own country, and to seek to relocate within that country, rather than seeking protection from another nation. The first obligation on a party who seeks international protection is to consider relocating within their own country.

32. In emphasizing the requirement that an applicant should first seek internal protection, regulations 7 and 8 provide as follows:

> "7. (1) As part of the assessment of protection needs, a protection decision maker may determine that a protection applicant is not in need of protection if the applicant can reasonably be expected to stay in a part of his or her country of origin where there is no well-founded fear of being persecuted or real risk of suffering serious harm.
>
> (2) In examining whether a part of the country of origin accords with paragraph (1), the protection decision-maker shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
>
> 8. For the purposes of assessing whether an international organisation controls a state or a substantial part of its territory and provides protection against persecution or serious harm, the protection decision-maker shall take into account any guidance

which may be provided in relevant Council acts."

33. Having considered the relevant definitions in the light of the relevant recitals, it seems to me that, depending on an assessment of the facts, a non-citizen may be entitled to subsidiary protection in a Member State where:-

(1) No substantial part of an applicant's country of origin is capable of providing them reasonable protection, through police and criminal justice services, from a real risk of suffering serious harm, or worse, through human action arising from international or internal armed conflict;

(2) A substantial territory within the country of origin can provide an applicant with a haven, despite international or internal armed conflict, against a real risk of suffering serious harm, or worse, through human action, either under the control of the country of origin, or another country, or of an international organization, but the conditions in that place are so serious from the point of view of resort to police and criminal justice protection, or from an imminent risk of international or civil war, that having regard to the personal circumstances of the applicant, he or she cannot reasonably have been expected to relocate there before applying for international protection or cannot reasonably now be returned there;

(3) An applicant is likely to suffer a real risk of being executed other than in accordance with due process of law in respect of a crime which is not internationally recognised as being so serious as to be responsibly considered as allowing for imposition of the death penalty, discounting, as I am obliged to, Ireland's opposition to that punishment on the basis of its obligations to implement European law;

(4) An applicant is likely to suffer a real risk of torture or inhuman or degrading treatment at the hands of his or her country of origin authorities or, if the apprehended harm comes from a non-state source, then (1) or (2) above applies or the situation in the country lacks any reasonably functioning police and criminal justice protection and no haven as in (2).

Procedures

34. I now turn to the procedural points. This is done in order to amplify on my finding that even prior to the implementation of the subsidiary protection Directive, the respondent Minister had the responsibility to refrain from deporting non-citizens when a right entitled them to remain in Ireland. I also consider whether the current procedure is correct in the process of declaring or rejecting the right to subsidiary protection. It is argued that the procedures followed in refusing the applicant subsidiary protection are in breach of their constitutional rights and their rights arising by virtue of the subsidiary protection Directive. Council Directive 2004/83/EC affirms the Geneva Convention relating to the Status of Refugees of 28 July, 1951, as supplemented by the New York Protocol of 31 January 1967, as the cornerstone of the international legal regime for the protection of Refugees; recitals 2 and 3. The principle thereby enshrined is that no one is to be sent back to persecution to their country of origin. That principle was complemented by measures on subsidiary forms of protection "to any person in need of such protection"; recitals 4, 5 and 6. Whereas Member States have the power to introduce more favourable provisions for those who request international protection, this is not required, notwithstanding the harmonising purpose of the Directive; recitals 6, 7, 8 and 25. Subsidiary protection is defined in terms of minimum standards that are complimentary and additional to refugee protection; recitals 17, 18, 21 and 24. Forms

of protection, as the Directive implies, existed in Irish law prior to the legislation on subsidiary protection. I regard it as important that these protections existed not on the mere basis of granting a privilege, but as rights.

35. Under s. 3(1) of the European Convention on Human Rights Act 2003 it is provided that "subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its function in a manner compatible with the State's obligations under the Convention provisions". The respondent Minister, therefore, in considering his existing statutory obligations in the context of a proposed deportation, prior to the creation of the concept of subsidiary protection, was obliged to have regard to the European Convention on Human Rights when considering whether a failed asylum seeker ought to be removed from the State in accordance with s. 3 of the Immigration Act 1999 and in considering the rights created by s. 5 of the Refugee Act 1996 under the principle of non-refoulement.. The rights under the European Convention on Human Rights were additional to the rights created by the latter section. These rights were there before the subsidiary protection legislation. As the recitals to the Directive imply, this situation in Irish Law was paralleled by differing approaches in other Member States which were to be harmonised through legislation a European level. Among the rights in respect of which consideration was given both in the State and in other European countries, were rights to privacy and family life as guaranteed by Article 8 of the European Convention on Human Rights:-

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of

national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

36. Article 3 of the European Convention on Human Rights prohibits inhuman or degrading treatment. Its wording reflects a concern parallel to that of the Directive. It provides:-

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

37. In *Agbonlahor v. Minister for Justice and Equality and Law Reform*, [2007] I.E.H.C. 166, Feeney J., emphasised the distinction between removing a person seeking international protection from the State to a place where they were are risk of being subjected to torture or inhuman or degrading treatment and a situation where it was necessary to balance the rights of an applicant, who by reason of his or her medical or family circumstances was seeking to remain in the State, against the entitlement of the State to control its immigration policy.

38. There is no basis upon which it could be considered that the contracting parties to the European Convention on Human Rights, or in the case of the subsidiary protection Directive, the European Union, intended to draw into their territory those persons who were seeking medical treatment which was not available in their home country. The European Treaty emphasises freedom of movement and freedom of establishment throughout the common territory of the Member States and the equivalence of entitlements and obligations of the nationals of the European Union. It only extends those rights to those outside that ambit by legislation, as in that under consideration here

39. In *Kouaype v. Minister for Justice, Equality and Law Reform,* [2005] IEHC 380, Clarke J. analysed the jurisdiction of the respondent Minister at the final stage of the asylum process. That final stage did not then involve considerations as to subsidiary protection. It involved, however, not only the granting of a discretion to stay in the State on humanitarian grounds, but also consideration of rights which gave a legal entitlement to remain. He held that the role of the court in reviewing decisions of the Minister at that stage was more limited than the review which the court exercised in considering the determination of the Refugee Applications Commissioner and the Refugee Appeals Tribunal. At paras. 4.13 and 4.14, Clarke J. stated:-

> "4.13 In that regard the Minister plays a role in the process which is not dissimilar to the role played by An Bord Pleanála in planning matters. The Board will undoubtedly receive a detailed report from a planning inspector which will contain recommendations as to the view which the Board might take. However the Board has before it all of the relevant materials that were considered by the Inspector and, it is well settled, the Board is free to make its own decision provided there be materials upon which it could come to the view which it takes. Given that amongst the materials that will be before the Minister in the case of a failed asylum seeker will be materials which have led to an unchallenged determination by the appropriate statutory body that the person concerned does not qualify for refugee status and did not, therefore, at least as of the time of that decision, come within the scope of s. 5 of the 1996 Act, it would require special circumstances before it could be said

that the Minister had an obligation to engage in any significant reconsideration of that aspect of the matter of deportation.

4.14 Clearly one such possibility may arise where it may be contended that there has been a significant change in material circumstances so that it could be argued that notwithstanding the view taken, at the time of its decision, by either the [Refugee Applications Commissioner or the Refugee Appeals Tribunal] the situation had changed to a sufficiently significant extent as to arguably lead to a different conclusion."

40. In summarising within that context the role of the court in judicial review applications, at para. 5.15, Clarke J. held as follows:-

"5.1 For all of the above reasons it seems to me that the grounds upon which a decision by the Minister to make a deportation order in the case of a failed asylum seeker, can be challenged are necessarily limited. Without being exhaustive it seems to me that it would require very special circumstances for such a review to be possible unless it can be shown that:-

(a) the Minister did not consider whether the provisions of s. 5 [of the Refugee Act 1996, the prohibition against refoulement] applied. Where the Minister says that he did so consider and in the absence of any evidence to the contrary this will be established;

(b) the Minister could not reasonably have come to the view which he did. It is unlikely that such circumstances could arise in practice in most cases of failed asylum seekers given that there

will already be a determination after a quasi judicial process which will in substance amount to a finding that the prohibition contained in s. 5 does not arise. However it should be noted that it is incumbent on the Minister to consider any matters which have come to his attention (whether by way of submissions or representations on behalf of the applicant or otherwise) which would tend to show a change in circumstance from the position which obtained at the time the original decision to refuse refugee status was made;

(c) the Minister did not afford the applicant a statutory entitlement to make representations [under s. 3 of the Immigration Act 1999] on the so called 'humanitarian grounds'; or

(d) the Minister did not consider any such representations made within the terms of the statute, or the factors set out in s. 3(6) of the 1999 Act, or (possibly) the Minister could not reasonably have come to the conclusion which he did in relation to those factors."

41. To that analysis must be added any issue as to whether the Minister has correctly discharged his function in determining whether removal from the State of a person seeking international protection would infringe any right additional to the non-refoulement right under s. 5 of the Refugee Act 1996 and which would otherwise entitle them to remain. In *Kozhukarov v. Minister for Justice, Equality and Law Reform,* [2005] IEHC 424, Clarke J. granted leave to seek judicial review pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000, to challenge a deportation order. The granting of such leave requires that there be substantial grounds for seeking the

remedy. The applicants were a family unit who had failed in a claim for refugee status based on their ethnic identity in their country of origin as Roma people. While in Ireland, a baby had been born to the family who was seriously ill and who had died while aged four months. The applicants pleaded that their right to pursue the grieving process in the country where their son was buried would be interfered with by deportation and so would be a breach of their European Convention rights. Clarke J. commented that his judgment in *Kouaype* concerned the correct approach by the respondent Minister in the situation of a failed asylum seeker where there were no special or changed circumstances and where the case made to the Minister against the making of a deportation order was similar to that which had failed before the Refugee Applications Commissioner and the Refugee Appeals Tribunal. At paras. 2.4 to 2.6 Clarke J. stated:-

> **"2.4** It seems to me that there are strong grounds for arguing (more than sufficient to establish the threshold of substantial grounds required at this stage) that, in addition to the matters identified in *Kouaype*, it is also, in principle and provided that the appropriate facts can be established, open to a party to seek to challenge the making of a deportation order (or in an appropriate case a refusal to revoke a deportation order) where it can be shown that there are substantial grounds for arguing that the making of (or refusal to revoke) such an order would be in breach of any other legal obligation on the part of the Minister (that is to say an obligation other than those imposed by s. 5 of the 1996 Act or s. 3(6) of the 1999 Act .
>
> **2.5** For example a number of cases have come before the courts where reliance is placed on the Criminal Justice (United Nations Convention

Against Torture) Act, 2000. While in most cases it will, as a matter of practice, be the case that a person who has been properly refused refugee status will be unable to establish an entitlement to prevent the Minister from making a deportation order under that Act, there is the possibility that there may be some cases where the facts establish a possibility that a person might be subjected to torture on being returned to a country where that risk could not be said to be for a convention reason sufficient to justify conferring refugee status. It is, therefore, possible that there may be cases where a person would, quite properly, be refused refugee status but would nonetheless be entitled to require the Minister to refrain from deporting them under s. 4 of the 2000 Act. Should a case to that effect be made to the Minister then the Minister must, of course, fully and properly consider any such case and may not, in those unusual circumstances, be entitled, in so considering, to place the same weight that would otherwise attach to the failure of the same applicant to succeed in persuading the relevant statutory bodies as to his or her entitlement to refugee status.

2.6 Similar considerations may apply in respect of family or other rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). It seems to me that it is arguable, sufficient for the purposes of leave that, in principle, an independent ground for seeking to challenge a deportation order (that is to say a ground independent of any contention that the Minister failed to properly consider s. 3(6) of the 1999 Act) may be to the effect that the making of a deportation order by the Minister in all the

> circumstances of the case concerned would amount to an impermissible infringement of the rights which the party concerned might have under the Convention. While, as I pointed out in *Kouaype,* the weighting of the various matters specified in s. 3(6) of the 1999 Act, is, in accordance with the authorities cited in that case and as a matter of pure domestic law, entirely a matter for the Minister, that does not mean that there are not cases where, in order that he act in a manner sufficient to ensure that the State comply with its obligations under the Convention as brought into effect in domestic law, the Minister may be obliged, as a matter of Irish law, to refrain from making the deportation order concerned or, in appropriate cases may be obliged to revoke such an order."

42. The approach of Clarke J., which was that of considering the proportion, or disproportion, of the rights argued for balanced against the entitlement of the State to provide for its own immigration policy, accords with that of Feeney J. in *Agbonlahor.*

43. In *Izevbekhai v. Minister for Justice, Equality and Law Reform,*, [2008] IEHC 23 the High Court reviewed a decision of the respondent Minister to deport a mother and two daughters back to Nigeria, their country of origin, from which they claimed to have fled due to a fear of female genital mutilation. One of the daughters of the principle applicant had died, according to documentation before the Minister, in consequence of blood loss following on this procedure. In analysing the issue as to the balance between any right that an applicant might have who was refused refugee status, as against the entitlement of the State to fix its own immigration policy, Feeney J. identified as an issue of primary importance whether the case to be made as to additional rights was different to that already presented before the Refugee

Applications Commissioner and the Refugee Appeals Tribunal. At para. 3.7, Feeney J. stated:-

> "It is appropriate to note that the reason upon which the first named applicant sought asylum in respect of herself and her two daughters was that the second and third named applicants were at grave risk of having female genital mutilation perpetrated against them if they were returned to Nigeria. That was the matter under consideration in the three applicants' applications for asylum which were refused. During that process the first named applicant expressly raised the issue of the death of her first daughter and the circumstances giving rise thereto. The first named applicant claims in relation to her first daughter [that] the circumstances surrounding her death were not disputed and were not central to the basis upon which the applicants' application were refused. The applicants' applications for asylum were rejected on the basis that the Tribunal found that on the present evidence there was no substantiation to the alleged risk to the applicant or of her children when considered objectively. The history was not disbelieved but rather, on a forward looking test, it was deemed that it had not been demonstrated that there was a reasonable degree of likelihood of a well founded fear of persecution in the future. Against that background the submission of or the obtaining of additional evidence to support or confirm the circumstances of the death of the first daughter would be of limited significance. The Tribunal in arriving at its decision was aware of the earlier death of the first named applicant's first child.

That is one of the factors available for consideration to the Refugee Appeals Tribunal prior to arriving at its decision."

44. Feeney J. rejected the proposition that yet another analysis of the claim of an applicant, in addition to that conducted by the Refugee Applications Commissioner and the Refugee Appeals Tribunal, was required from the respondent Minister in accordance with the grounds tentatively identified by Clarke J. in the *Kozhukarov* case. He did not reject the proposition that where there were different matters placed before the Minister which were in support of different rights than those argued for in front of the Refugee Applications Commissioner and the Refugee Appeals Tribunal that these would have to be considered by the Minister. Rather, he held that no such rights had been identified in that particular case.

45. It follows from the foregoing decisions that where an additional right is claimed to those which entitle an applicant to refugee status under s. 2 of the Refugee Act 1996, that the Minister prior to deporting such an applicant must first consider whether the claim made is the same in substance as that which has already been contended for and has failed before the Refugee Applications Commissioner and the Refugee Appeals Tribunal. If the matter is the assertion of a new right based on substantially new facts, then the Minister must consider it fairly. The issue before the Minister is settled if the right asserted is an absolute one, such as the right arising from the prohibition on refoulement or the right not to be tortured. If it is a right that needs to be balanced as against the entitlement of the State to have and implement an immigration policy, then that right may be less or more important than the State's entitlement. Where the issue is subsidiary protection, it is the case that these rights exist above any entitlement of the State to refuse to accommodate a non-citizen.

Whether a right to subsidiary protection exists depends, however, of a fair assessment of the facts.

46. It should be remembered that a right does not exist independently of a factual matrix so far as the law is concerned. In the applications now before the courts, a contention was made on behalf of the N. applicants that they were at risk of female genital mutilation and that they could not relocate, in order to avoid that possibility, within their countries of origin. Further it was claimed that the E. and O. applicants had been trafficked for the purposes of prostitution and could not return to their countries of origin. These claims, which were rejected before the Refugee Applications Commissioner and on appeal before the Refugee Appeals Tribunal are, in substance, the same claims which were made to the respondent Minister for subsidiary protection. Fr. N. put further material as to her medical and psychological condition, quoted above, before the respondent Minister. I read the rulings of Feeney J. in the *Izevbekhai* decision and Clarke J. in *Kozhukarov* decision as requiring the respondent Minister to fully and properly consider any case as to additional rights where such has not previously been considered. Where, as a matter of substance, however, a contention as to the factual basis for such rights is the same as that which is already been processed under the Refugee Act, 1996, then the case law clearly establishes that the Minister is entitled to place some degree of weight on the failure of the applicant to succeed in persuading the Refugee Applications Commissioner and the Refugee Appeals Tribunal as to their entitlement to refugee status and as to their credibility.

47. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status O.J.L. 326/13 13.12.2005 approximates the rules of procedure for the granting and

withdrawing of refugee status in order to limit the secondary movement of applicants for asylum between Member States, where such movement is caused by differences in respective legal frameworks; recital 6. The Directive, commonly called the procedures Directive, applies to all applications for asylum made within the territory of Member States; Article 3. It allows Member States to provide for more favourable standards on procedures for granting and withdrawing refugee status than as set out in the Directive; Article 5. It provides guarantees in relation to timeframe, the services of an interpreter, access to the United Nations High Commission for Refugees, a reasonable time limit on making decisions and information of the result of a decision; Article 10.

48. The Directive does not require for instance, that there should be an appeal procedure allowing for re-examination of the circumstances of an applicant for refugee status who has failed or that such an appeal should be a complete re-consideration, on oral evidence, of the entire circumstances of the case as is provided for in Irish law by the Refugee Act 1996, s.16, as amended. Article 3 provides as follows:-

> "1. This Directive shall apply to all applications for asylum made in the territory including at the border or in the transit zones of the Member States, and to the withdrawal of Refugee status.
> 2. This directive shall not apply in cases of requests for diplomatic and territorial asylum submitted to representatives of Member States.
> 3. Where Member States employ or introduce a procedure in which asylum applications are examined both at applications on the basis of the Geneva Convention and applications for other kinds of international protection given under circumstances defined by Article 15 of Directive 2004/83/EC

[the subsidiary protection Directive], they shall apply this Directive throughout their procedure.

4. Moreover, Member States may decide to apply this directive in procedures for deciding on applications for any kind of international protection."

49. When the procedures Directive came into force, Ireland was already operating the procedures for the determination of refugee status set out in the Refugee Act, 1996, as amended. The Commissioner for Refugee Applications was mandated to investigate applications for refugee status which were made under s. 8 of the Act. When the matter had been investigated, the Commissioner was required to prepare a report in writing of the results of the investigation making a recommendation as to whether the applicant should or should not be declared to be a refugee; s. 13. If the decision was in the negative, then the applicant was entitled to seek an appeal. Only under s. 13(6) could an applicant be deprived of an oral hearing before the Refugee Appeals Tribunal, and then only in specific circumstances were the application had shown either no basis or a minimal basis for claiming refugee status; where the applicant had provided such false information as to lead to the conclusion that the application was manifestly unfounded; where the applicant had failed without reasonably cause to make an application as soon as reasonable practicable after arriving in the State; where the applicant had lodged a prior application for asylum in another country; or where the applicant was a national of, or had a right of residence in, a country where she or he would not be persecuted. Under s. 15 of the Act, as amended by s. 11(1)(j) of the Immigration Act 1999, the Refugee Appeals Tribunal was established "to consider and decide appeals under s.16 of this Act". The Tribunal did not have, and does not have now under any subsequent amending Act, any power to consider applications for subsidiary protection pursuant to Directive 2004/83/EC,

the subsidiary protection Directive. Since the Directive did not require an equivalent procedure for the deciding of subsidiary protection obligations, the respondent Minister was not entitled to amend the legislation through a necessity of European law by a mere statutory instrument. I will return to this point in another context.

50. The European Communities (Eligibility for Protection) Regulations 2006, (S.I. No. 518 of 2006) therefore devolved the responsibility for considering issues as to subsidiary protection on to the respondent Minister. In practice this is done, and on the oral and documentary evidence in this case, it is responsibly done, by the Minister's officials. An application for subsidiary protection is made at the same time as an application for leave to stay in the State on humanitarian grounds, or in respect of the prohibition on refoulement, and can only be made under the Regulations following upon a rejection of refugee status application by such an applicant by the Refugee Applications Commissioner and, if an appeal is taken, by the Refugee Appeals Tribunal; regulations 3 and 4. Regulation 4(2) provides that the Minister is only obliged to consider applications that come under s. 3(2)(f) of the Immigration Act 1999 – meaning an application for asylum which has already been rejected by the Minister.

51. In other respects, the statutory instrument mirrors the subsidiary protection Directive. Thus, the procedure chosen is one which allows for the consideration of issues as to subsidiary protection only after an applicant has applied for refugee status and has been unsuccessful in that regard. Instead of a patchwork of rights applying variously in different Member States, the objective of subsidiary protection in European law is met by establishing a floor of rights which are common to all applicants in each country of the European Union.

52. Critical to any decision as to subsidiary protection is the situation in the country of origin of the applicant. Similar considerations arise where an application for refugee status is made save that, in that instance, the crucial issue is that of the persecution, or feared persecution, of an applicant whereas in subsidiary protection decisions by the respondent Minister the issue is as to what might reasonably be feared will happen if a failed asylum seeker is returned to their country of origin. Subsidiary protection is a right but the procedure of having the respondent Minister consider other rights of a failed asylum seeker existed in Irish law in respect of other rights prior to the implementation of the subsidiary protection Directive.
The minimum standards laid down for consideration of applications by Council Directive 2005/85/EC, the procedures Directive, is provided for in article 8 as follows:-

> "1. Without prejudice to Article 23(4)(i) [failing without reasonable cause to make an application when having had an opportunity to do so], Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.
>
> 2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that
>
> (a) applications are examined and decisions are taken individually, objectively and impartially;
>
> (b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of

origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

3. The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 2(b), necessary for the fulfilment of their task.

4. Member States may provide for rules concerning the translation of documents relevant for the examination of applications."

53. In this case, a specific complaint is made that country of origin information, which was not known to the applicants, or at least was not sent by them in support of their application, was used by the respondent Minister in deciding that none of the applicants faced a threat that could not properly be dealt with by internal relocations in their country of origin. In *H. and Ors. v. Minister for Justice, Equality and Law Reform,* [2007] I.E.H.C. 277, Feeney J. analysed the subsidiary protection Directive in terms of the application of common criteria to Member States and of its purpose. He held that the Directive drew on existing Member State practice but might, where that Member State practice differed from the Directive, impose new protection obligations on individual Member States. The case concerned the entitlement of persons seeking subsidiary protection to apply for such status after the subsidiary protection Directive had come into force.

Since the Directive came into force on 10th October, 2006, applications under the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) created rights which must be considered as and from that time. In giving his decision as to whether persons who are subject to deportation orders prior to that day could also invoke the aid or the subsidiary protection Directive, Feeney J. stated as follows:-

> "The Directive brought new common criteria on certain date. As regards Ireland these 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 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 demonstrated 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 [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 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."

54. In this passage, it seems to me, Feeney J. emphasises the importance of the respondent Minister considering up to date information. This seems to me to be right. A clear obligation is cast on the respondent Minister to fairly consider an application for subsidiary protection both in terms of the situation of an applicant and the true situation in their country of origin. Both Directive 2005/85/EC, the procedures directive, and the decision in *H. and Ors. v. Minister for Justice Equality and Law Reform*, emphasize that the function in looking at the situation in the country of origin of an applicant devolves on the decision maker.

Here, the decision maker is the Minister. It was argued for the applicants that a fair consideration of the country of origin information material would have required the

respondent Minister in each of these cases to issue a letter as regards deportation and subsidiary protection and then to receive and, secondly, fairly consider a submission, in that regard. That submission is correct and accords with the practice of the respondent Minister and with the facts in this case. Then there is the third stage, where a decision is made, as it was made in this case. It was argued that other stages should follow. If the Minister is to look at other country of origin information then it is contended that there must be, fourthly, a stage where this other material is furnished to the applicant who would then be asked whether any submissions were to be offered either in general, or it might be argued, as to particular parts, of the country of origin information. At the fifth stage a further submission would be received from the applicant which then, at a sixth stage, would be analysed for the purpose of coming to a rational decision whereby one type or set of country of origin information is preferred from another. Finally, the seventh would involve a reasoned decision being made by the Minister as to why one set of country of origin information, or one aspect of country of origin information, is to be preferred in contrast to another. This was to be set out in writing as a reasoned decision and would be the subject of applications for judicial review.

55. The procedure argued for presupposes a complete lack of trust being properly exercised by the respondent Minister through his officials. The relevant Directives and the case law which I have cited in this judgment emphasise the necessity for the decision maker to obtain up-to-date country of origin information. That process may be assisted by submissions on behalf of the applicant. Neither under European or national law do they control the process. Once a submission is made, it is not necessary either under European or national law, to return to an applicant with queries or questions unless, in the opinion of the Minister, such query or question may be of

assistance to him in discharging his function in determining the true state of the applicant's country of origin.

56. It was further argued on behalf of the applicants that to fail to engage in the seven-stage process contended for, would leave an applicant for judicial review without a reasoned decision and in circumstances where the Minister might unreasonable decide an application on the basis of one piece of country of origin information, or set of reports, in contra-distinction to another. In my view, the Minister is under a duty to act carefully and honestly in considering an applicant's entitlement to subsidiary protection. An applicant will, no doubt, make the best possible case that is available on the basis of country of origin information. That case may assist the Minister, it may be real in terms of what it puts forward, or it may be exaggerated. Any submission may be checked against what the Minister already has available to him and supplemented by any reliable additional reports. The receipt of submissions may assist in the process, but it does not relieve the Minister of his responsibility to make a fair decision.

57. The reality of the multiplicity of written decisions on judicial review on refugee matters emanating from the High Court displays strong evidence for the proposition that judges in considering the actions of the statutory bodies under the Refugee Act, 1996 exercise a heightened level of scrutiny when compared to other forms of judicial review that concerns administrative decision makers. I do not think that it would be fair to the principle of the primary importance of human rights merely to apply in judicial review applications of a determination by the Minister a test as to whether his determination as to the situation in the country of origin of the applicant, and as to whether protection was reasonably available within that territory, by asking whether that decision flew in the face of fundamental reason and common sense; the ordinary

test for overturning decisions of fact in judicial review of administrative or quasi-judicial tribunals. Rather, it seems to me, that a decision on the country of origin of an applicant and the availability of protection within its territory should be scrutinized if a judicial review is taken and the decision should only stand if it be a rational one that is fairly supported by the country of origin information. That, it seems to me, is what Council Directive 2005/85/EC, the procedures Directive, is seeking to achieve when placing on the examining bodies and Member States the responsibility in making objective and impartial decisions based on precise and up-to-date information from reliable sources.

58. I am fortified in this conclusion by the decision by Clarke J. in *Kouaype v. Minister for Justice Equality and Law Reform and Another,* [2005] I.E.H.C. 380. There, a similar claim was made that the Minister should enter into correspondence regarding the prohibition on refoulement under s. 5 of the Refugee Act 1996. Clarke J. rejected that proposition in the following terms:-

> "4.9 In *Baby O. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 169 the Supreme Court again had to consider the statutory regime in respect of deportation orders. While many of the issues which were relevant in that case do not arise here, the court did consider grounds raised by the applicant in *Baby O* based upon s. 5 of the 1996, Act. The decision of the Minister in that case (insofar as it was concerned with s.5) was the same as in this case i.e. ("the Minister has satisfied himself that the provisions of s. 5 (Prohibition or Refoulement) of the Refugee Act 1996 are complied with in your case'. In respect of that decision of the Minister, Keane C.J. said the following:-

"I am satisfied that there is no obligation on the first respondent to enter into correspondence with a person in the position of the second applicant setting out detailed reasons as to why refoulement does not arise. The first respondent's obligation was to consider the representations made on her behalf and notify her of the decision; that was done and accordingly this ground was not made out".

4.10 It is clear, therefore, that the Supreme Court in *Baby O* was also of the view that the obligations upon the Minister when considering making a deportation order are different from those which arise in the case of the statutory bodies charged with the task of determining whether to recommend that a person be granted refugee status. Finally, although I do not attach great weight to this issue, it is worthy of some note that the Minister does have a limited but real role in respect of substantive refugee applications themselves. At a formal level a successful applicant for refugee status receives (under s. 17(1)(a) of the 1996 Act) a declaration from the Minister declaring that the applicant is a refugee. In that context it is worthy of note that the Minister is required by that section to give the declaration of refugee status where either the RAC, or in the case of a rejection by the RAC, the RAT on appeal, makes a recommendation to that effect. However where the RAC recommends against granting such declaration and, if there be an appeal, the RAT affirms that decision, the Minister under s. 17(1)(b) may refuse to give the applicant a declaration. It is clear therefore that the Minister retains discretion to grant a declaration even in cases

where the final recommendation of the statutory bodies is to the contrary."

59. Similarly, and based on similar reasoning, Feeney J. rejected the same proposition in *Izevbekhai v. Minister for Justice, Equality and Law Reform,*, [2008] IEHC 23. At para. 4.7 Feeney J. stated as follows:-

> **"4.7** The narrow view as to the scope of review available in respect of a decision by the Minister to make a deportation order subsequent to a failed asylum application, recognises that the decision-making process carried out by the Minister is not an inquisitorial process. An inquisitorial body has obligations in relation to fair procedures and a requirement to bring to the attention of a party, whose rights may be affected, matters of substance and importance which the inquisitorial body may regard as having the potential to affect its judgment. However the Minister is not carrying out an inquisitorial process. In this case his decision does take place subsequent to a failed asylum application. The claim that there was reliance on undisclosed materials in breach of fair procedures does not arise herein. The requirement to disclose relevant documentation to asylum seekers and their legal representatives extends to bodies such as the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal but does not extend to the exercise of a Ministerial discretion. There is no requirement for the Minister to enter into correspondence based on country of origin information and this is clear from the judgment of Keane C.J. in the *Baby O.* case (see page 183). The Court is satisfied that there was no obligation on the Minister either in a general way or

in any way to identify any reasons giving rise to his decision to deport. The claim that the Minister had such obligation is rejected."

60. An entitlement to reasons can arise in administrative law either by reason of an entitlement devolved from logic or through an entitlement declared by statute. In *International Fishing Vessels Limited v. Minister for The Marine,* [1989] I.R. 149, the applicant was refused a fisheries licence in bold and dismissive terms. He had an entitlement to reasons because he could, by improving his equipment or honestly applying on a different basis on a subsequent occasion, then, or later establish an entitlement to a licence. In terms of statutory entitlement, Article 4(2) of Directive 2005/85/EC, the procedures Directive, requires that persons refused refugee status should be informed in writing as to why their application as been rejected. Apart from principles devolving from utility and statutory entitlement, the duty of an administrative body to give reasons is otherwise insufficiently described in law. As a matter of fact, however, in all of these cases, the decision makers, who are officials of the respondent Minister, provided detailed reasons for the decisions which they had arrived at. These have been the subject of this review.

Assessment of the facts

61. As regards the Em. and O. applicants, they claim to have been tricked into prostitution in Italy, from which they escaped. They did not complain to the police in Italy, nor did they seek to return to Nigeria for the purpose of assisting the criminal justice authorities to prosecute Madam Iron Lady and Madam Vivian respectively. They have each been the subject of an individual crime if their accounts, discounting for the moment the assessments made of their applications under the Refugee Act

1996, could be regarded as genuine. They would not be persons entitled to subsidiary protection under the relevant definition in European law. On a fair appraisal of the country of origin information, there is nothing to stop them returning to Nigeria and living quietly in another part of the country. Insofar as they claim to fear magic the court must discount this as a reason which has nothing to do with the relevant definition giving an entitlement to legitimately seek the protection of a Member State. Insofar as it as been claimed that if they returned to Nigeria and co-operated with the prosecuting authorities in pursuing charges against Madam Iron Lady and Madam Vivian, supposing for the moment that they are capable of identifying these individuals for the purposes of such a process, a reasonable assessment of the country of origin information suggests that few prosecutions have been taken and that a small fraction of these have been successful and have resulted in small sentences of between two and three years imprisonment. There is nothing in the papers, however, which indicates to the court that as a matter of Nigerian law these applicants are obliged to report the crimes which they claim have been committed against them or to pursue the prosecutions as State witnesses under compulsion of law. As a matter of fact, therefore, they are outside the definition entitling them to subsidiary protection.

62. The N. applicants came to Ireland, it is claimed, fearing the malicious actions of a small group of individuals in one pagan shrine in one part of Nigeria. The territory of Nigeria is somewhat less than a million sq km. Ireland would comfortably fit inside Nigeria a dozen times, and this island ten times. Fr. N. is suffering from anxiety and depression and has been the victim of mutilation far in the past. Any fair appraisal of the country of origin information indicates that any fears she may have for her daughter in Ireland, and potentially any fear that she may have had which somehow caused her to leave three other daughters, together with her husband, in

Nigeria can be countered by seeking state protection in the very large part of Nigeria which forbids female genital mutilation. There is no indication that Nigeria, through a state agency or otherwise, intends to discriminate against her on the basis of her condition of depression and there is nothing in the documents before me which suggests that her condition is so grave that she will be ostracized and mistreated, as can be the risk in Nigeria where people suffer from a serious psychiatric condition of a manic kind giving rise to psychosis.

63. Any issue which any of the applicants have, therefore, is one which, as a matter of fact, falls to be dealt with by the Minister under s. 3 of the Immigration Act, 1999 in the exercise of his discretion as to humanitarian leave to remain in the State. None qualify for subsidiary protection even assuming that the cases that they have made are correct and the accounts that they have given are true. To make that an assumption I would have to nullify the assessments made by the Refugee Applications Commissioner and the Refugee Appeals Tribunal. Leave was not granted to consider that issue in these proceedings and having read the papers I cannot see how any error of fact might have occurred.

64. Those seeking refugee status and subsidiary protection are obliged to give a true account of the relevant circumstances which have drawn them into seeking protection in another country. Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) emphasises this. It mirrors the Subsidiary Protection Directive and it provides as follows:-

> "5. (1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:
>
> (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including

laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the protection applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he or she could assert citizenship.

(2) The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as 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, but compelling reasons arising out

of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.

(3) Where aspects of the protection applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met—

(a) the applicant has made a genuine effort to substantiate his or her application;

(b) all relevant elements at the applicant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for protection at the earliest possible time, (except where an applicant demonstrates good reason for not having done so); and

(e) the general credibility of the applicant has been established."

65. It has been argued that where an applicant for subsidiary protection has already suffered trauma in the past, an entitlement to subsidiary protection arises under regulation 5(2). This would mean that any person who has suffered a violent assault in the past would be entitled to come to Ireland and obtain the benefits as to health, housing and welfare that those entitled to subsidiary protection enjoy under the Directive as transposed into Irish law. I do not read the second part of regulation 5(2) as creating a right to subsidiary protection which differs from, or is an addition, to the rights already declared by Directive 2004/83/EC. Rather, it is a means of assessment

as to what has happened to the applicant. Such an assessment can give rise to a compelling reason for not returning them to their country of origin. It could be the case that by reason of the harm which an applicant for subsidiary protection had already suffered, that considerations might arise which warranted a determination that an applicant should be allowed to remain in the State. However, that determination is dependant upon a decision that "the applicant is eligible for protection", and this only arises where they otherwise fit within the definition giving rise to the entitlement for subsidiary protection in the first instance. I believe this interpretation is correct because, in addition to that reason, an entitlement to subsidiary protection only entitles a person to stay in the State until the situation in their country of origin changes for the better. During that time, they are entitled to health, and social welfare benefits which are entitlements arising in favour of Irish citizens and European Union citizens under separate Acts of the Oireachtas that the Minister is not entitled to amend by secondary legislation since nothing in the Directive requires that any person who has suffered a trauma in the past thereby becomes eligible for subsidiary protection. As the Supreme Court unanimously held in the passage in *Quinn v. Ireland,* [2007] 2 I.L.R.M. 101 (per Denham J.) at pp. 108 and 109:-

> "To provide that a law may be amended by statutory instrument as in the European Communities Act, 1972, is an exceptional power given by the Oireachtas, pursuant to the Constitution, to a Minister. It was necessitated by the obligations of membership of the European Communities, which itself gave rise to a high volume of technical regulations based on Community law. Such power would, in general, be an impermissible delegation of legislative powers, without the specific legislative and constitutional foundation.

I am satisfied that it would be a step too far to infer such a power in an Act which did not expressly provide for such a power. Further, I am satisfied that to make such an inference would be to legislate - a matter for the Oireachtas, not a court of law.

Indeed, it would be an unconstitutional construction of the Act of 1993. There being a constitutional construction to the provisions open, then that is the correct construction. In essence, the power created in s. 3(2) of the European Communities Act, 1972 is not in the Animal Remedies Act, 1993, and that is fatal to the argument of the respondents. At its height the drafting is ambiguous.

Consequently, the Animal Remedies Act, 1993 not containing any such constitutionally valid express power to the Minister to amend a regulation having statutory effect, I am satisfied that the Minister does not have such power. Therefore, the Minister does not have the power to make regulations to amend previous regulations which he has made under the Animal Remedies Act, 1993 as the original regulations made by the Minister have 'statutory effect'. The fact that new regulations would have the same status as the previous regulations does not meet the problem that statutes may not be amended by statutory instruments unless expressly and constitutionally so provided, as in the European Communities Act, 1972. Such power is a delegation of legislative power only constitutionally sound because it is necessitated by the obligations of the European Community. The issues raised by the absence of the express power to the Minister are fundamental in a parliamentary democracy. A democratic deficit is an issue to be determined by

the Oireachtas. It is only when that body expressly and constitutionally delegates its great power that the power may be exercised by a Minister."

66. It is only if the situation of the country of origin gives rise to the need for subsidiary protection that any issue as to internal relocation needs to be considered as to any obligation devolving on an applicant. If, on a fair appraisal of the country of origin information, resort may be had to a substantial part of the territory of origin of the applicant, then consideration should be given to the personal circumstances of the applicant and as to whether it is reasonable to require him or her to go to that territory and to stay there. It is difficult to see how international relocation by subsidiary protection is an entitlement specific to a person who has suffered from a violent or sexually violent assault in the past where the legislation places on them an obligation to seek internal relocation when they are under active threat in the present.

Decision

67. Under Irish Law an applicant for subsidiary protection pursuant to Directive 2004/83/EC must, as a matter of law, have already ventilated the facts and circumstances whereby they claim they have been subjected to persecution, or to be at risk of persecution, in their country of origin. It is only upon rejection of such claim under the Refugee Act 1996 by the Refugee Applications Commissioner, following on an oral hearing, and on appeal, on a further oral hearing in these cases, by the Refugee Applications Tribunal, that they are entitled in law to make an application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006. (S.I. No. 518 of 2006, which transposes the Directive). That application is to the respondent Minister.

68. The primary focus on such an application is any risk to which an applicant alleges he or she is subject if returned to their country of origin, considered in the light of the situation in terms of peacefulness and the functionality of ordinary protection of that country. In defining a right to be protected against serious harm, the European and Irish legislation both focus on attacks or threats by human agency. This definition excludes the state of health, whether physical or mental, of an applicant and, instead, involves someone in their country of origin executing them, subjecting them to torture or degrading treatment or, more generally, an applicant on return being placed in a situation of violence by reason of civil or international war.

69. The primary focus for decision making under Directive 2005/85/EC is on obtaining reliable and up-to-date country of origin information. It is not necessary for the Minister, in making such decisions, to engage in a dialogue with an applicant for subsidiary protection. Rather, the responsibility is his to make a fair and reasoned appraisal, after submissions in writing by an applicant, based on what he knows of the country from which the applicants come. The concept of subsidiary protection does not apply to individual circumstances concerned with the commission of crime, such as trafficking or prostitution or genital mutilation, unless the individual circumstances of an applicant in the light of country of origin information leads to the conclusion that a state of affairs exists in respect of which neither national protection where they live in their country of origin, nor internal relocation to another part of their country of origin, a fundamental obligation cast on those seeking international protection, is available to them. The relevant definitions are considered in the text of this judgment.

70. The procedures involved in considering subsidiary protection entitle an applicant to make representations to the Minister. A primary question in considering those representations should be whether what is contended for is new, or has already

been, in substance, the subject of a determination by the Refugee Applications Commissioner or, on appeal, the Refugee Appeals Tribunal. If substantially new material is put forward it must be given a fair and reasoned consideration.

In none of these cases was material put forward which did not substantially repeat the case already made under the Refugee Act 1996. In the case of N., additional materials were submitted as to the physical and mental health of the applicant which, it was claimed, corroborated the account which had previously been rejected by the statutory bodies under the Refugee Act, 1996. This case was given fair and reasoned consideration.

71. Nothing in the Procedures Directive requires that the decision making process as to whether a non-citizen is entitled to subsidiary protection should be the same as that for refugee status. Specifically, the State was allowed under European law to choose the procedure considered in this judgment and it has been operated fairly.

72. For the above reasons the applicants are not entitled to judicial review of the respondent Minister's decision to refuse them subsidiary protection.

Approved
24 April 2008