

THE HIGH COURT

JUDICIAL REVIEW

2011 188 JR

BETWEEN

S. L.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM AND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 6th day of October, 2011

1. By order of the Court of 14th March, 2011 (Cooke J.), leave was granted to the applicant to apply for certain declaratory reliefs by way of judicial review directed, broadly speaking, at the legality or adequacy of the State's transposition into national law of the provisions of Council Directive 2005/85/EC of 1st December, 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status ("the Procedures Directive"). The reliefs sought also challenge the validity of Regulation No. 4 of the European Communities (Eligibility for Protection) Regulations 2006, as *ultra vires*, in circumstances where the State is alleged to have failed to designate a "determining authority" for the purposes of Article 4 of the Procedures Directive in respect of applications for subsidiary protection.

2. The applicant's apparent standing to bring this application for judicial review is based upon the fact that, in response to a letter proposing to deport him dated 21st January, 2011, received from the first named respondent, he opted to submit a "without prejudice" application for subsidiary protection as a person whose application for a declaration of refugee status under the Refugee Act 1996, had been refused by the Minister. The application was said to have been made on a "without prejudice" basis in the letter of application of 4th February, 2011, because of the intention to challenge the legality of the arrangements in place for determining such applications under the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations"). These Regulations implement in Irish law the provisions of Council Directive 2004/83/EC of 29th April, 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualifications Directive"). At the time of hearing of the present application, no determination had been made by the first named respondent on that application for subsidiary protection.

3. As indicated, the essential argument made on behalf of the applicant is that the procedures in place under the 2006 Regulations for the making, consideration and determination of applications for subsidiary protection contain a "structural flaw". It is said that while the respondent Minister is, perhaps, a "competent authority" for dealing with matters in the area of asylum, he has not been formally designated as a "determining authority" as required by Article 4.1 of the Procedures Directive. That provision is as follows:

"Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive, in particular Articles 8(2) and 9."

4. Much emphasis was laid upon the fact that Ireland is the only Member State which now legislates separately for applications for declarations of refugee status, under the Refugee Act 1996, and, on the other hand, applications for subsidiary protection under the 2006 Regulations. In the former procedure there are two stages namely, the report and recommendation made by the Office of the Refugee Applications Commissioner under s. 13 of the Act of 1996, followed, in the case of a negative recommendation, by an appeal to the Refugee Appeals Tribunal under section 15. It is pointed out that in Annex I to the Procedures Directive, special provision was made to enable Ireland to regard the Office of the Refugee Applications Commissioner as being the "determining authority" for the purpose of the decision on an asylum application at first instance, notwithstanding the fact that under the Act of 1996, it is the Minister who makes the "decision" under section 17(1).

5. In the case of subsidiary protection on the other hand, the application is made to and determined by the Minister alone and there is no first stage decision by any "determining authority" and no appeal against a refusal. This, it is argued, is an inadequate transposition of the Procedures Directive which vitiates the validity in law of the 2006 Regulations and, in particular, Regulation 4 thereof.

6. In the judgment of the Court, these arguments are unfounded. In essence, they ignore the basic legislative fact that the Qualifications Directive had two objectives. First it lays down common minimum standards for the substantive assessment of applications for refugee status in accordance with the Geneva Convention; and, secondly, it introduces to the common asylum system of the European Union a complementary form of international protection to be called "subsidiary protection" in Union law. The provisions of the Qualifications Directive apply to both forms of international protection. The Procedures Directive, on the other hand, applies only to applications for asylum, except where a Member State has availed of the option or entitlement to put in place a "one-stop" procedure in which a single application is made and then considered and determined in one process, covering both asylum and subsidiary protection. The Irish legislation has not, to date, taken that course and there is no obligation in Union law for it to do so. In that regard, it is to be noted that enforcement proceedings against the State were taken by the European Commission for failing to implement some particular elements of the Procedures Directive. Although the European Commission, in its report of 8th September, 2010, to the European Parliament and the Council on the application of the Procedures Directive [2010 COM 465 Final] noted that all Member States other than Ireland had put in place a single procedure with a single designated determining authority for both types of application, no complaint was made of any failure on the part of the State to comply with Community law in that regard. (See the judgment of the Court of Justice in Case C-431/10 of 7th April, 2011[2011] ECR I-000). (The deficiencies of implementation identified by the European Commission in that proceeding have since been met by the provisions of the European Communities (Asylum Procedures) Regulations 2011, S.I. No.51 of 2011).

7. This distinction between the respective areas of application of the Qualifications Directive and the Procedures Directive can be seen in the explicit terms of the latter.

(a) The Directive's title is 'Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status'.

(b) Article 1 provides that the purpose of the Directive "is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status".

(c) In Article 2(b), the term "application for asylum" is defined as meaning "an application made by a third country national or stateless person which can be understood as a request for international protection from a Member State under the Geneva Convention" (the Geneva Convention deals exclusively with the status of refugee; subsidiary protection is an innovation of European Union law).

(d) In Article 2(e), the term "determining authority" is defined as meaning "any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum . . ."

(e) Article 4.1, already quoted above, refers to responsibility for examination of applications in accordance with the Directive, and, particularly, Articles 8(2) and 9; the latter Articles relate to applications for asylum only.

8. Importantly, the scope of the Procedures Directive is defined in Article 3.1: "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."

It is to be noted that this provision is mandatory.

9. That is to be contrasted with para. 4 of the same Article which is permissive:

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

In other words, while Member States must achieve the common minimum procedural standards in the asylum process, they are free to choose to apply the same provisions in any other form of international protection including, obviously, subsidiary protection but are not obliged to do so. The explanation for this provision is to be found in Article 3.3 which provides:

"Where Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection given under the circumstances defined by Article 15 [of the Qualifications Directive], they shall apply this Directive throughout their procedure."

10. In other words where in a Member State there is only a single combined procedure covering both asylum applications and applications for subsidiary protection, the minimum standards laid down must apply to that unified procedure. As already mentioned, however, that course has not been taken in the legislative and administrative arrangements put in place for subsidiary protection in this jurisdiction.

11. In the judgment of the Court, this construction of the provisions of the Procedures Directive and of its relationship with the Qualifications Directive is a full answer to the ground sought to be advanced in this application. It must also be pointed out, however,

that even if that were not so, it is clear that, as a matter of Irish law, the first named respondent is the "determining authority" for the purpose of the procedures relating to applications for subsidiary protection. This is so because it is clear from the provision of Regulation 4 of the 2006 Regulations, that the first named respondent is the authority to whom applications for subsidiary protection are made, and, as explicitly stated in subparagraphs (4) and (5), is the authority which determines whether an applicant is "a person eligible for subsidiary protection" or not.

12. Thus, even if it could be said that there was some necessity for the designation of a "determining authority", whether under the Procedures Directive or under the Qualifications Directive (*quod non*), the obligation has clearly been discharged by the adoption and coming into force of the 2006 Regulations. European Union law does not prescribe what legislative or administrative instrument should be employed at national level in any Member State in order to give effect to such an application, subject only to requiring that the principles of equivalence and effectiveness are respected. (See for example in that regard the judgment of the Court of Justice in Case C-339/87 *Commission v Netherlands* [1990] ECR I-851 at paragraphs 5 to 8.) As the 2006 Regulations are enacted as a statutory instrument adopted pursuant to the provisions of the European Communities Act 1972 (as amended), the function and effective authority in law of the Minister, as the agency responsible for determining eligibility for subsidiary protection in the State, is beyond question. It follows accordingly that there has been no deficiency in the transposition of the Qualifications Directive or of the Procedures Directive and that there is no "structural flaw" in the 2006 Regulations.

13. For all these reasons, the application for judicial review is refused.