[2009] IEHC 61

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 300 J.R.]

BETWEEN

E. P. I., N. A. I.

(A MINOR SUING BY HER MOTHER AND NEXT FRIEND, E. P. I.), T. I. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, E. P. I.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Brian McGovern delivered on the 27th day of January, 2009

1. This is an application for judicial review wherein the applicants seek:

   (i) An order of *certiorari* quashing the respondent's decision issued on 19th March, 2008, refusing to consider the applicants' application for subsidiary protection;

   (ii) A declaration that the respondent's refusal to consider the applicants' application for subsidiary protection is unlawful;

   (iii) An injunction prohibiting the respondent, his servants or agents from deporting the applicants pending the determination of their application for subsidiary protection, and

(iv) A declaration that the manner in which the respondent, his servants or agents is applying the European Communities (Eligibility for Protection) Regulations (S.I. No. 518 of 2006) is in breach of Directive 2004/38/EC and the State's duties thereunder.

Leave to apply for judicial review was granted by order of the High Court made on 20th March, 2008.

Historical facts

2. The first named applicant is the mother of the second and third named applicants. On 20th January, 2005, the applicants entered the State and sought declarations of refugee status pursuant to the provisions of the Refugee Act 1996. The basis of the applicants' claim was that the first named applicant was in fear of her own life and the lives of the second and third named applicants as a result of threats made by the family of the husband of the first named applicant, to perform female circumcision or Female Genital Mutilation ('FGM') on the second and third named applicants. It is an accepted fact that the first named applicant's eldest daughter died in July 1994 from haemorrhage associated with FGM which was carried out after she and her husband submitted to pressure to permit her husband's relatives perform the procedure on her daughter.

3. On 25th February, 2005, the Office of the Refugee Applications Commissioner ('ORAC') recommended that the applicants not be declared eligible for refugee status. The applicants appealed against this decision to the Refugee Appeals Tribunal ('RAT') and on 22nd June, 2005, the RAT affirmed the recommendation of ORAC.

4. The legislation which governs the procedures to be adopted in asylum applications provides that the validity of a notification refusing refugee status shall

not be questioned otherwise than by way of an application for judicial review. The same procedure applies with regard to deportation orders made under s. 3(1) of the Immigration Act 1999.[1] No such challenge was brought against the decision of the RAT.

5. On 2nd September, 2005, the Department of Justice, Equality and Law Reform ('The Department') refused the applicants' application for asylum.

6. On 13th September, 2005, the Department wrote to the applicants informing them that the respondent proposed making deportation orders in respect of them and informed them that they could make written representations within fifteen days for temporary leave to remain in the State. The Refugee Legal Service sent representations to the Department on behalf of the applicants on 4th October, 2005. Having examined the applicants' file, the respondent signed deportation orders in respect of the three applicants on 23rd November, 2005.

7. The applicants were notified of the requirement to report to the Garda National Immigration Bureau ('GNIB') on 5th December, 2005, by letter sent to them on 29th November, 2005. The applicants failed to present to the GNIB on the appointed date. Although officers from the GNIB attended at the applicants' residence in Sligo on 8th December, 2005, the first named applicant went into hiding. The second and third named applicants were taken into care on that date and were subsequently made the subject of interim care orders pursuant to s. 17(1) of the Childcare Act 1991, in Sligo District Court.

8. The first named applicant was apprehended by members of An Garda Siochána on 12th January, 2006, and was detained in Mountjoy women's prison. On 13th January, 2006, a notice of motion seeking an extension of time within which to

[1] Section 5 Illegal Immigrants (Trafficking) Act 2000

bring judicial review proceedings against the deportation orders was filed and on 18th January, 2006, a notice of motion and statement of grounds seeking leave to apply for judicial review issued in the Central Office returnable for 23rd January 2006.

9. On that date, the High Court received an undertaking from the respondent not to deport the first named applicant pending the determination of the judicial review proceedings and released the first named applicant from detention upon certain undertakings being given.

10. Leave was granted by the High Court to apply for judicial review and by order of the High Court made on 30th January, 2008, the applicants' application for judicial review of the deportation orders was refused. The applicants sought a certificate for leave to appeal to the Supreme Court as was required under the legislation and this was refused.

11. The undertaking given by the respondent not to deport the applicants expired on 13th March, 2008.

12. On 4th March, 2008, the applicants applied to the respondent pursuant to Regulation 4(2) of the European Communities (Eligibility for Protection) Regulations 2006, for the respondent to exercise his discretion to allow the applicants to apply for subsidiary protection under the 2006 Regulations. On 19th March, 2008, the Department wrote to the applicants refusing the Regulation 4(2) application, on the basis that there were no grounds which would enable the respondent to exercise his discretion under Regulation 4(2) of the 2006 Regulations, and as a consequence, the respondent had decided not to exercise his discretion to accept and consider the subsidiary protection applications.

13. Although the applicants sought an undertaking from the respondent not to deport them while they sought counsel's opinion, the Department declined to give

such an undertaking. On 20th March, 2008, the applicants sought leave to apply by way of judicial review for an order of *certiorari* quashing the respondent's decision issued on 19th March, 2008, to refuse to consider their application for subsidiary protection and for other ancillary relief. On that date, the High Court granted leave to the applicants to apply for judicial review in respect of some of the reliefs sought. These are the reliefs set out in this judgment in paragraph 1, and this is the application that is before the court. On that date, the court granted an injunction to the applicants preventing their deportation pending the determination of this judicial review.

Subsidiary protection

14. In this application before the court, the applicants are applying for subsidiary protection in the State. The remedy of subsidiary protection has evolved in order to deal with the protection of persons who are not entitled to refugee status, but who otherwise need international protection on the grounds of the situation which exists in their country of origin and who, if returned to their country of origin, would face a real risk of suffering harm and are unable, or, owing to such risk, unwilling to avail themselves of the protection of that country. Council Directive 2004/83/EC of 29th April, 2004, sets down minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection. The European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) ('the 2006 Regulations') transpose the qualification Directive into Irish law. These Regulations were made under s. 3 of the European Communities Act 1972, and came into force on 10th October, 2006.

15. Regulation 4(2) of the 2006 Regulations, provides that the Minister is not obliged to consider an application for subsidiary protection from a person other than a

person to whom s. 3(2)(f) of the Immigration Act 1999, applies (*i.e.* a person whose application for asylum has been refused), or which is in a form other than that provided for in the Schedule to the Regulations or a form to like effect. After the 2006 Regulations came into force, an issue arose as to the entitlement of persons to apply for a subsidiary protection where deportation orders had already been made against them. These people did not come within the scope of Regulation 4(2) and it was argued that the Minister would not be obliged to consider their application. This matter was considered by Feeney J. in *N.H. and T.D. v. the Minister for Justice, Equality and Law Reform* [2007] IEHC 277. In the course of his judgment (at p. 26) he said:

> *"In the majority, if not the vast majority of cases, where the Minister considered whether or not to make a deportation order prior to the implementation of the Directive, the Minister would have to have considered the same or identical matters as would require to be considered in relation to 'serious harm' as defined in the Directive. However, it could not be said that that was the position in all cases. Regulation 4(2), however, provides a mechanism to allow discretion to be considered and, if appropriate, exercised in the exceptional case."*

16. Later in his judgment, he said:

> *"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."* (p.36).

17. It is clear from that decision that in exercising his discretion, the Minister may have regard to any new or altered circumstances or facts identified by the person seeking to have the Minister exercise his discretion. The situations identified by Feeney J. as potentially amounting to altered circumstances are:

(a) That the applicant's position is affected by the change in the definition of "*serious harm*";

(b) That altered personal circumstances have arisen, or;

(c) That conditions in the applicant's country of origin had changed.

The decision of Feeney J. in *N.H. and T.D. v. MJELR* was approved by Birmingham J. in *Gavrylyuk & Anor. v. Minister for Justice, Equality and Law Reform* [2008] 1 IEHC 321.

Submissions

18. The following is a summary of the applicants' legal challenge to the respondent's refusal to consider their application for subsidiary protection:-

(i) The respondent erred in law and/or made an irrational finding in holding that the documentation submitted by the applicants was "*similar in content*" to that submitted prior to the issuing of the deportation orders.

(ii) The respondent erred in law and was in breach of his duty to apply fair procedures and/acted irrationally in failing to properly engage with the new material and in failing to provide an adequately reasoned decision.

(iii) The respondent was in breach of his obligation to ensure that the State acted in a manner that complied with s. 3 of the European

Convention on Human Rights which provides that, "*no one shall be subjected to torture or inhuman or degrading treatment or punishment*".

(iv) The respondent not only failed to perform his duty to fully examine the evidence submitted by the applicants, but his officials applied a fixed test in purporting to determine whether the respondent could exercise his discretion and consider the applicants' application for subsidiary protection and thereby unlawfully fettered the respondent's discretion and unlawfully usurped his Ministerial function. As part of this submission, the applicants claim that the respondent's officials erred in law in their application of a requirement that the applicants show "*altered circumstances*" by fettering the respondent's discretion and failing to recognise his duty under the European Communities (Eligibility for Protection) Regulations 2006, to consider the past persecution suffered by the first named applicant through the loss of her eldest daughter and the importance of this loss in the assessment of future risk to the second and third named applicants, and that this, *per se,* gave rise to a compelling case for subsidiary protection.

19. The respondent replies by submitting as follows:

(i) The documentation submitted to the respondent was similar in content to that previously submitted prior to the deportation orders. He says that there was no error of law or irrationality in the conclusion reached, namely, that the documentation submitted was "*similar in content*".

(ii) There was no error of law or breach of fair procedures and/or irrationality in failing to properly engage with the new materials or in failing to provide an adequately reasoned decision. The respondent submitted that his duty, in considering the material submitted in support of an application under Regulation 4(2) of the 2006 Regulations, is analogous to the limited duty placed upon the respondent when determining whether the provisions of s. 5 of the Refugee Act 1996, are satisfied in the course of an application for leave to remain in the State on humanitarian grounds, notwithstanding the failure of an applicant's application for refugee status. He says that there is no requirement for the respondent to engage in a document by document analysis of the material submitted or a detailed analysis of the country of origin documentation proffered. The consideration is, by necessity, limited to an examination as to whether the documentation presented establishes a significant change in material circumstances from those documents presented at the time when the deportation orders were made. The respondent says that this analysis was fair and rational.

(iii) Insofar as it is alleged that the respondent has a duty under Article 3 of the European Convention on Human Rights, the respondent argues that his analysis of an application for humanitarian leave to remain in this State pursuant to s. 3 of the Immigration Act 1996, from the perspective of s. 5 of the Refugee Act 1996, must necessarily incorporate a consideration of whether the person

concerned is in danger of undergoing treatment in breach of Article 3 of the European Convention on Human Rights. The applicants' case has already been considered pursuant to s. 5 of the 1996 Act, and the deportation orders have been found valid by the High Court. The respondent argues that the consideration of an application under Regulation 4(2) is necessarily limited to a decision as to whether the application/documentation discloses a significant change in material circumstances to those pertaining at the time of the making of the deportation order. An application under Regulation 4(2) is not a substantive application for subsidiary protection and is necessarily circumscribed by the fact that the respondent has already had regard to the application of s. 5 of the Refugee Act 1996, as amended.

(iv) The respondent does not accept that his discretion was fettered in any way and says that the issue is moot as the applicants have no automatic right to be considered eligible to apply for subsidiary protection pursuant to Regulation 4(2) of the 2006 Regulations. The respondent asserts that the courts have expressly recognised that the respondent was entitled to accept an application for subsidiary protection as being valid under the 2006 Regulations, from persons such as the applicants, so long as they are able to identify new facts or circumstances arising after they have been refused leave to remain. This does not amount to a fixed policy or an unlawful fettering of a discretion, but is simply a correct application of the law.

(v) The reference to Regulation 5(2) of the 2006 Regulations, only applies to persons eligible to make a substantive application for subsidiary protection and not to those who are only entitled to request the respondent to exercise his discretion under Regulation 4(2) to permit the person concerned to apply for subsidiary protection. The respondent's officials did not err in law in applying a requirement that the applicants show altered circumstances. This is the limit of the discretion conferred on the respondent by Regulation 4(2).

The law

20. Article 4(2) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No, 518 of 2006), states:

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

It applied only to deportation orders made after the date on which it came into effect, namely, 10th October, 2006. In *N.H. v. Minister for Justice, Equality and Law Reform* and *T.D. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 1, Feeney J. stated at page 36:

> *"The Directive does not impose any requirement to review earlier decisions either as regards subsidiary protection or refugee status. If it did, it would have to have done so in express terms, given the clear recognition of existing different practices within the Member*

State. There is no requirement for across the board reconsideration of earlier decisions as that could only arise if there was an unconditional and precise provision to that effect. (See para. 37 *Farrell v. Whitty and Ireland,* judgment of First Chamber 19th April, 2007). *The Directive came into effect on a precise date. The Directive recognised that decisions in relation to subsidiary protection had been made in Member States prior to that date. Those decisions were valid decisions and if the Directive required such decisions to be reopened, 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 10th October, 2006, but it is open to such persons to seek to have the Minister consider their application if they can identify facts or circumstances which demonstrate a change or alteration from what was the position at the time that the deportation order was made. Those altered circumstances could include a claim that their personal position is affected by the Directive's definition of serious harm. Altered circumstances might also arise as a result of the passage of a prolonged period of time resulting in altered personal circumstances or alterations in the conditions in the Applicant's country of origin. It is open to the 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."

21. Following this decision, a number of challenges were made by way of judicial review to the refusal by the respondent to exercise his discretion under the 2006 Regulations. In *Gavrylyuk v. Minister for Justice, Equality and Law Reform* and *Bensaada v. Minister for Justice, Equality and Law Reform*, Birmingham J., delivered 14th October, 2008, the learned judge accepted the extent of the Minister's discretion as outlined by Feeney J. in *N.H. and T.D. v. Minister for Justice, Equality and Law Reform*. At paragraph 82 of his judgment, he stated:

> "*. . . the Minister does not have an obligation to reconsider the situation of any person in relation to whom a deportation order was made prior to the coming into force of the 2006 Regulations. Nevertheless, the Minister retains a discretion under Regulation 4(2) to accept and consider an application for subsidiary protection from an applicant who is able to show that a change of circumstances has arisen since the deportation order was made.*"

In *Kouaype v. Minister for Justice, Equality and Law Reform*, Clarke J, Unreported 9th November, 2005, the judge stated at paragraph 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.*"

At paragraph 4.11 of the same judgment, Clarke J. stated:

> "*Having regard to all of the above, it seems to me that the role of the court in reviewing that aspect of the decision of the Minister to make a deportation order which requires the Minister to be satisfied that the*

provisions of s. 5 of the Act of 1996 do not apply to the case under consideration is, in all cases, but in particular in cases where the applicant concerned has already been the subject of a decision to refuse a declaration of refugee status, necessarily significantly more limited than the role of the court in considering the determination of the statutory bodies in respect of the refugee process itself."

22. The respondents argue that the same principles must clearly apply to applications pursuant to Regulation 4(2) of the 2006 Regulations and I accept that submission.

23. The applicants argue that the respondent did not give sufficient consideration to the further documents which were produced. In *Baby O. v. Minister for Justice* [2002] 2 I.R. 169, Keane CJ. stated at page 183:

"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 representation made on her behalf and notify her of the decision."

24. In *N.H. v. Minister for Justice, Equality and Law Reform* and *T.D. v. Minister for Justice, Equality and Law Reform*, Feeney J. stated that the Directive to be found in Article 4(2) of the European Communities (Eligibility for Protection) Regulations 2006, does not impose any requirement to review earlier decisions, either as regards subsidiary protection or refugee status.

25. It would seem to follow from the above authorities that the applicants in this case have no automatic right to be considered eligible to apply for subsidiary protection pursuant to Regulation 4(2). Rather, the respondent was entitled to accept

an application for subsidiary protection as being valid under the Regulations from the applicants as long as they can identify new facts or circumstances arising after they were first refused leave to remain.

26. In an *ex tempore* judgment given on 27th June, 2008, in *Opeogun v. Minister for Justice, Equality and Law Reform*, Birmingham J. stated:

> *"The objective of subsidiary protection is not to provide a further or parallel appeal against a conclusion reached after due deliberation that the applicant was not, in fact, at risk of serious harm."*

27. The applicants rely on Regulation 5(2) of the 2006 Regulations. This reads as follows:

> *"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."*

28. The applicants also draw the court's attention to the definition of "*serious harm*" contained in the 2006 Regulations. "*Serious harm*" consists of: -

> *"(a) Death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."*

The facts

29. In order to determine the issue before me, it is necessary to look at the nature of the evidence which the applicants claim should have been considered by the respondent and which amounted to altered circumstances. The applicants state that the documents submitted in their application for subsidiary protection which post-dated the issuing of the deportation orders included the following:

(i) An affidavit of Fiona Hardy sworn on 26th March, 2006. She is an Irish doctor working in Nigeria and states that in her view, it would be unsafe for the applicants to return to Nigeria as they could not obtain adequate protection from the practice of FGM;

(ii) An email from BAOBAB (an NGO) which states *inter alia* that BAOBAB has concerns about the way in which its views were represented by the United Kingdom Home Office in its report on Nigeria, which report was relied on by the respondent in his decision to issue deportation orders against the applicants;

(iii) Affidavit evidence from persons in Nigeria who knew the applicants, corroborating the first named applicant's fear that FGM will be perpetrated on the second and third named applicants;

(iv) The country of origin information which was not considered by the respondent in his decision to issue deportation orders against the applicants, which information corroborates the first named applicant's fear that FGM will be forcibly perpetrated against her daughters if they are returned to Nigeria.

The applicants also state that further evidence in support of their case has been submitted and contains the following:

(i) An email from Philip Boucher Hayes, RTE journalist;

(ii) An email from a *'Sunday Independent'* journalist, Ms. Antonia Leslie;

(iii) A letter from the first named applicant dated 20th March, 2008, stating that her husband's ten year old cousin who resides in the United Kingdom was recently subjected to FGM while on a visit to Nigeria, and;

(iv) A letter from Amnesty International dated 19th March, 2008, which states *inter alia* that Amnesty believes the second and third named applicants are at risk of FGM if returned to Nigeria.

30. In the course of the hearing, Mr. Christle S.C. on behalf of the applicants laid particular emphasis on the affidavit of Dr. Fiona Hardy and Dr. J.I.T. Unokanjo. I think it is of relevance to point out that the affidavits of Dr. Hardy and Dr. Unokanjo and the affidavits of Reverend Samtumba and Wale Ayoola, together with the information from BAOBAB, were referred to by the first named applicant in her affidavit challenging the deportation order in the earlier proceedings before Feeney J. In those proceedings, the applicants failed in their challenge to the original deportation order.

31. What I have to consider is whether or not the material produced before the Minister in this application for subsidiary protection was new information or gave rise to altered circumstances.

32. The basis of the applicants' claim for refugee status has at all times been a fear that the second and third named applicants would be subjected to FGM if they had to return to Nigeria and the first named applicant expressed fears for her own safety. Furthermore, the applicants' claim for refugee status and their original deportation order were considered on the basis that it was accepted that her eldest daughter had died as a result of haemorrhage following FGM. Does the information which has been furnished to the respondent since the earlier deportation, give rise to altered circumstances?

Conclusions

33. I accept the authorities which I have outlined above set out the correct procedure to be adopted in cases of this nature and I apply the principles set out in those decisions in determining the issues before me in this case.

34. The essence of the applicants' claim is that the first named applicant feared that if the applicants were returned to Nigeria, the second and third named applicants would be forced to submit to FGM by members of her husband's family. She, herself, apprehended that she would be physically harmed as there had been threats of physical violence made against her.

35. I have reviewed the additional information which the applicants put before the respondent with a view to having him exercise his discretion under Article 4(2) to allow them to apply for subsidiary protection, having regard to the fact that a deportation order had already been made and that an unsuccessful challenge had been made against it. In that challenge, Feeney J. gave judgment on 30th January, 2008. At paragraph 4.1 of his judgment, he stated:

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

36. It is clear, therefore, that before the Minister signed the deportation order on 23rd November, 2005, he had some additional information including the medical certificate identifying the deceased child's cause of death, and also a medical report from a doctor who treated the first named applicant's deceased daughter. Feeney J. has already held that that did not constitute a significant change in material circumstances. It is not clear whether the information contained in the affidavit of Fiona Hardy was available to the Minister before he made that deportation order. She swore an affidavit on 27th March, 2006, in the proceedings, challenging that deportation order. But the information may not have been before the respondent at the time when he made the order. An examination of that affidavit indicates that Dr. Hardy worked in Nigeria for two years and that her work concerned community development and ensuring that rural people were able to buy genuine, effective medicines instead of fake medicines which had flooded the market in Nigeria. She

was constantly travelling throughout the country and met with many health professionals, health workers and nurses. She became acquainted with the practice of FGM as it is widely practiced in Nigeria, and she described it as a deeply rooted traditional practice which pervades much of Nigerian society. She was of the view that in the Nigerian police force, bribery was rife and that there was much corruption. She expressed the view that the police authorities could not, "*be assured of providing any significant protection for Mrs. I. and her children, and that women's rights were not high on the priorities of the police authority*". She said that FGM is practiced on an enormously wide scale, particularly in the south, and that many health workers and health professionals regard it as a cultural norm and accept it as a fact of life there. For reasons expressed in her affidavit, she did not regard it as safe for the applicants to return and did not regard relocation to the north of the country as a safe option for the family.

37. There was nothing new about this information. It merely served to corroborate the first named applicant's account. However, there was other country of origin evidence suggesting that internal relocation was an option and in any event, the decision of the RAT refusing the applicants refugee status has not been challenged.

38. Having considered the information on which the applicants rely in this judicial review, I am satisfied that they do not show altered circumstances or "*new facts*" but, rather, amount to amplification of the case made by the applicants, and in some cases corroboration of the case made by them.

39. The respondent had a limited duty imposed on him by Regulation 4(2) of the 2006 Regulations. It was to consider the representations made on the applicants' behalf and notify them of the decision. There was nothing irrational in the respondent accepting the advice which he received from his officials in this case and acting upon

that advice. The documentation submitted in support of the application was similar in content to the documents previously submitted prior to the signing of the deportation orders. It is clear from the authorities which I have set out in this judgment that the role of the respondent was significantly limited, having regard to the fact that applications pursuant to Regulation 4(2) ordinarily involved persons who have been the subject of a decision to refuse a declaration of refugee status in their claim for asylum.

40. In this case, the applicants' case has already been considered pursuant to s. 5 of the 1996 Act, and the deportation orders have been found valid by the High Court. I accept the respondent's submission that the application for humanitarian leave to remain in the State pursuant to s. 3 of the Immigration Act 1996, from the perspective of s. 5 of the Refugee Act 1996, must necessarily incorporate a consideration of whether the person concerned is in danger of undergoing treatment in breach of Article 3 of the European Convention of Human Rights.

41. The applicants have no automatic right to be considered eligible to apply for subsidiary protection pursuant to Regulation 4(2) of the 2006 Regulations. The consideration by the respondent of an application under Regulation 4(2) is necessarily limited to a decision as to whether the application discloses a significant change in material circumstances to those pertaining at the time of the making of the deportation order.

42. I hold that the applicants did not disclose a significant change in material circumstances to those pertaining at the time of the making of the deportation order on 23rd November, 2005, and there was nothing irrational about the respondent's decision in concluding that there were no grounds for him to exercise his discretion under Regulation 4(2) of the 2006 Regulations. I also hold that the respondent gave

sufficient reasons for his decision, having regard to his limited role. The applicants claim that the Minister fettered his discretion. I reject that claim. If the respondent had in place a policy of not accepting applications for subsidiary protection as being valid under the 2006 Regulations in the absence of altered circumstances or new facts being identified, this was not a fixed policy or unlawful fettering of discretion, but a correct application of the law.

43. In the circumstances as outlined in this judgment, I must refuse the application of the applicants.

Approved 27-01-09