High Court of Ireland Decisions

Judgment

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THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 31 J.R.]

BETWEEN

B. A. AND R. A.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY AND THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 12th day of December 2014

1. These proceedings challenge the validity of S.I. No. 426 of 2013, The European Union (Subsidiary Protection) Regulations 2013 (the "2013 Regulations"). The applicants are a mother and daughter. The mother is a national of Ghana who sought asylum in Ireland in August 2007. Her daughter was born in Ireland on 8th October 2007 and this child's application for asylum was considered as part of her mother's claim.

2. The basis of the claim for international protection (asylum and/or subsidiary protection) is important in these proceedings. What follows is the mother's account of the persecution she fears and the circumstances of her travel to Ireland.

The Applicants' Account:

3. When the first named applicant was 10 or 12 years old, her parents converted from Christianity to Islam, though she remained Christian and was living with her grandmother. She had problems with her father because of her refusal to convert to Islam and he beat her and would not let her play with other children. She married a Christian in 2001, against her father's wishes. He threatened her in 2002 and beat her twice in 2003, hitting her with a chair and causing the loss of four teeth. She was also kicked and threatened with death. In 2004, her father attacked her when she was pregnant and this resulted in a miscarriage. She did not seek police protection because she claims her father was a powerful man who would be able to bribe the police. In 2005, the applicant's father arranged for her to be attacked by Muslim youths. In 2007, when she was pregnant, her father threatened her and she and her husband relocated within Ghana. However, the applicant's husband was attacked and thereafter she and her husband decided to flee Ghana. On 15th June 2007, they boarded a ship which stopped after two weeks. The first named applicant's husband left the ship to collect some supplies but he did not return. The applicant eventually arrived in Ireland and claimed asylum on 15th August 2007. Her claim for asylum was refused, ultimately by the Refugee Appeals Tribunal, because her credibility was rejected and because she ought to have sought police assistance in relation to her troubles in Ghana.

4. The applicants sought subsidiary protection in 2009 pursuant to the EC (Eligibility for Protection) Regulations 2006. With the adoption of new rules for the determination of subsidiary protection applications on 18th November 2013, the applicants' solicitors made complaint that S.I. No. 426 of 2013 is invalid.

5. The applicants' solicitors requested that their clients' applications for subsidiary protection proceed without prejudice to their entitlement to claim that the 2013 Regulations were invalid. Because there was either no reply or a neutral reply to this request, the applicants instituted these proceedings in advance of the determination of their claim.

Relevant Legislative Provisions:

6. Council Directive 2004/83/EC (the 'Qualification Directive') and various Recitals in the Directive were opened to the Court. They state as follows:

Recital 6:

> "The main objective of this Directive is, on the one hand, to ensure that

Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States."

Recital 16:

"Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention."

Recital 24:

"Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention."

Recital 25:

"It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States."

Article 1 of the Directive provides:

"The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted."

7. Article 2 of the Qualification Directive contains the relevant definitions utilised therein.

Article 2(e) provides:

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

Article 2(g) provides:

"application for international protection' means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately."

Article 4 provides:

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

2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be

carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin. . .

(b) the relevant statements and documentation presented by the applicant…

(c) the individual position and personal circumstances of the applicant. . .

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection . . .

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

Article 6 provides:

"Actors of persecution or serious harm

Actors of persecution or serious harm include:

(a) the State;

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

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

Article 7 provides:

"Actors of protection

1. Protection can be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

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

8. Chapter V of the Qualification Directive is entitled 'Qualification for Subsidiary Protection'. Article 15 in Chapter V is entitled 'Serious Harm' and it provides as follows:

"Serious harm consists of:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

European Union (Subsidiary Protection) Regulations 2013:

9. The relevant provisions of the 2013 Regulations are as follows. The Preamble states that the Minister for Justice and Equality:

"... in exercise of the powers conferred on [him] by section 3 of the European Communities Act 1972 (No. 27 of 1972), and for the purpose of giving further effect to Council Directive 2004/83/EC of 29 April 2004 hereby make the following regulations."

10. Article 2 provides definitions of phrases and words used in the 2013 Regulations. The relevant provisions of Article 2 are:

""person eligible for subsidiary protection" means a person—

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

(b) who does not qualify as a refugee,

(c) in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm and who is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

'Serious harm' means:

"(a) death penalty or execution,

(b) torture or inhuman or degrading treatment or punishment of a person in his or her country of origin, or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict.

'torture' has the meaning it has in section 1 (as amended by section 186 of the Criminal Justice Act 2006) of the Criminal Justice (United Nations Convention Against Torture) Act 2000."

11. Article 2(2) provides:

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

12. Article 3 provides:

"3. (1) An application for a subsidiary protection declaration—

…

shall be—

(i) made within the period specified in the notice referred to in subparagraph (a), and

(ii) addressed to the Commissioner and made in writing, in the form set out in Schedule 1 or a form to the like effect."

13. Article 15 of the 3013 Regulations is entitled 'Actors of Serious Harm' and applies as follows:

"For the purposes of these Regulations, actors of serious harm include—

(a) a state,

(b) parties or organisations controlling a state or a substantial part of the territory of that state, and

(c) non-state actors, if it can be demonstrated that the actors referred to in subparagraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against serious harm."

Criminal Justice (United Nations Convention against Torture) Act 2000 (as amended by the Criminal Justice Act 2006):

14. Section 1(1) of the Criminal Justice (United Nations Convention Against Torture) Act 2000 as amended by s. 186 of the Criminal Justice Act 2006, provides, in relevant part that:

"'Torture' means an act or omission done or made or at the instigation of, or with the consent or acquiescence of a public official by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person -

(a) for such purposes as-

(i) obtaining from that person, or from another person, information or a confession,

(ii) punishing that person for an act which the person concerned or a third person has committed or is suspected of having committed, or

(iii) intimidating or coercing that person or a third person.

(b) for an reason that is based on any form of discrimination, but does not include any such act that arises solely from, or is inherent in or incidental to, lawful sanctions."

Submissions:

15. The applicants maintained two grounds of challenge to the 2013 Regulations. Firstly, it was contended that the 2013 Regulations are ultra vires the European Communities Act 1972 (the "1972 Act") because vesting the decision making power in respect of subsidiary protection applications in the Refugee Applications Commissioner (the second named respondent) cannot be achieved using a Statutory Instrument made under s. 3 of the 1972 Act. Secondly, it is claimed that the definition of 'torture' provided in the 2013 Regulations is an unlawful transposition of the definition contained in the Qualification Directive. It is proposed to deal with each argument in turn.

The Ultra Vires Argument:

16. The applicants set out the relevant provisions of the Constitution and the European Communities Act 1972 applicable to this area.

> Article 29.4.10 of the Constitution provides:
>
> "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by the institutions thereof, or by bodies competent under the Treaties establishing the Communities from having the force of law in the State."

17. Article 15.2.1 of the Constitution provides:

> "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

18. Section 1 of the European Communities Act 1972 (as amended) provides:

> "The following shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in the Treaties governing the European Union:
>
> (a) the treaties governing the European Union;
>
> (b) Acts adopted by the institutions of the European Union (other than Acts to which the first paragraph of Article 275 of the Treaty on the Functioning of the European Union applies);
>
> (c) Acts adopted by the institutions of the European Communities in force immediately before the entry into force of the Lisbon Treaty; and
>
> (d) Acts adopted by bodies competent under those Treaties (other than Acts to which the first paragraph of the said Article 275 applies)."

19. Section 3 of the 1972 Act provides:

> "(1) A Minister of State may make regulations for enabling section 2 of this Act to have full effect.
>
> (2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act)."

20. The applicants contend that the 2013 Regulations changed the law in a radical and momentous way by transferring the Minister's power to determine protection applications to the Office of the Refugee Applications Commissioner ("ORAC") and the Refugee Appeals Tribunal ("RAT"). It is contended that this transfer was not necessitated by EU law and unless the transfer of functions was incidental to matters that were necessitated, it ought to have been achieved by the enactment of primary legislation.

21. Counsel states that the Minister in exercising powers under s. 3(2) of the 1972 Act must exercise such power constitutionally and refers the court to the cases of *East Donegal Co-Operative v. Attorney General* [1970] 1 I.R. 617, *Laurentiu v. Minister for*

Justice [1999] 4 I.R. 26 and *Maher v. Minister for Agriculture* [2001] 1 I.R. 139 in this regard.

22. It was submitted that the transfer of powers from the Minister to ORAC and the RAT is wholly independent of the principles and policies contained in the Qualification Directive, and further that such a transfer manifestly could not have been achieved by Statutory Instrument as a matter of Irish public law. The consequence, it is submitted, is that the purported transfer by S.I. is *ultra vires* the powers conferred on the Minister by s. 3 of the 1972 Act. Further, it is asserted that it constitutes an impermissible exercise of executive power contrary to Article 28.2 of the Constitution. In each case, counsel for the applicants submits that the measure is vitiated by the absence of Oireachtas authorisation. Counsel relies on the authorities of *Sulaimon v. Minister for Justice and Equality* [2012] IESC 63, *Bode (A Minor) v. Minister for Justice, Equality and Law Reform* [2007] IESC 62, *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 and *Dunne v. Donohue* [2002] 2 I.R. 533 for this proposition.

23. Finally, the applicants believe that even if the power has been exercised constitutionally, it is submitted that the transfer of the decision making power from the Minister to ORAC and the RAT represents a change in the law of such significance and import and is so removed from the purposes of the Qualification Directive, that it cannot be incidental, consequential and supplementary within the meaning of section 3(2) of the 1972. Reliance is placed on the judgment of Cooke J. in *M.S.T. v. Minister for Justice* [2009] IEHC 529 in this regard.

24. In short, the complaints the applicants raise with regard to the *ultra vires* claim are:

> (a) That the 2013 Regulations and so much of them as purport to divest the Minister of his power to decide applications for subsidiary protection and to transfer those powers to the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal are *ultra vires* the Minister;
>
> (b) That the Minister had no lawful power pursuant to s. 3 of the 1972 Act to make the 2013 Regulations;
>
> (c) That the Minister had no lawful power to make the 2013 Regulations in order to give effect to the Qualifications Directive;
>
> (d) That any increase or alteration of the powers of ORAC and / or the RAT must be made by an Act of the Oireachtas;

25. Counsel for the applicants outlines the jurisprudence in respect of the implementation of EU law into domestic law and the scope of ministerial powers in the area. The applicants refer to *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 and the dicta of Denham J. where she stated:

> "If the directive left to the national authority matters of principle or policy to be determined then the "choice" of the Minister would require legislation by the Oireachtas. But where there is no case made that principles or policies have to be determined by the national authority, where the situation is that the principles and policies were determined in the directive, then legislation by a delegated form, by regulation, is a valid choice. The fact that an Act of the Oireachtas has been affected by the policy in a directive, is a "result to be achieved" wherein there is now no choice between the policy and the national act. The policy of the directive must succeed. Thus where there is in fact no choice on a policy or a principle it is a matter appropriate for delegated legislation. If the directive or the Minister envisaged any choice of principle or policy then it would require

legislation by the Oireachtas."

26. Denham J. further states:

> "If the regulations contained material exceeding the policies and principles of the directives then they are not authorised by the directives and would not be valid under s. 3 unless the material was incidental, supplementary or consequential. In those circumstances if they were not incidental, supplementary or consequential the regulations would be an exercise of legislative power by an authority not so permitted under the Constitution. If it be within the permitted limits, if the policy is laid down in the directive and details only are filled in or completed by the regulations, there is no unauthorised delegation of legislative power."

27. The applicants note that the issue was elaborated on in the case of *Maher v. Minister for Agriculture* [2001] 1 I.R. 139, where Keane C.J. stated:

> "I am satisfied, however, that neither the judgment of the court nor the judgments of Blayney J. and Denham J. on the *vires* issue lend any support to the proposition that, in cases where it is convenient or desirable for the community measure to be implemented in the form of a Regulation rather than an Act, the making of the Regulation can for that reason alone be regarded as "necessitated" by the obligations of membership. Thus, while it appears from the judgment of the court that an argument was advanced on behalf of the respondents in that case that the necessity for "expedition" in the implementation of a Directive would justify its implementation in the form of Regulation rather than an Act, such a submission, as a general proposition, would, in my view, be unsustainable and derives no support from the judgments in *Meagher v. Minister for Agriculture*. Doubtless, where no policy choices are left to the member State, expedition is one of the factors which may legitimately be taken into account in deciding to opt for the making of a Regulation rather than the enactment of primary legislation, but it would be a serious overstatement to say that it justifies the making of regulations rather than the enactment of an Act in the case of every Directive or EU Regulation and again that is clearly not consistent with what was held by this court in *Meagher v. Minister for Agriculture*."

28. Counsel for the respondent submits that contrary to the position of the applicants, a Member State may make provision for a personal interview / appeal as part of the process of adjudicating applications for subsidiary protection. It is contended that the introduction of such standards reflect the principles and policies contained in the Qualification Directive and do not constitute the exercise of a discretion by the Member State going beyond anything contained in the Directive. In this regard, it is submitted that the 2013 Regulations, insofar as they provide for a scheme for the determination of subsidiary protection applications, implement the Qualification Directive and thus in principle are within the scope of the constitutional immunity conferred by Art. 29.4.10. Counsel further submits that the Directive gives the Member States a choice as regards the content of the implementing measures and that in this case the 2013 Regulations come within the principles and policies of the Directive.

29. Counsel examines the cases of *Meagher* and *Maher* and expressly refers to the dicta of Denham J. in the latter case where she concluded:

> "Applying the principles and policies test to this case, if the principles and policies are to be found in the European regulations then it is open to the first respondent to proceed by way of statutory instrument. If there are choices to be made within a scheme then these choices may not be policy decisions. The exercise of a choice governed fully by a structure established in a policy document (such as a European regulation) is not the determination of a policy."

30. The respondents submit that this is significant in that it recognises that the mere making of a choice in the implementation of a European measure may not constitute a policy decision in every case. It is contended that it is not simply a question of asking

whether the implementing measure reflects the exercise of some discretion on the part of the Member State, but whether the choice itself is a policy decision. In this regard it is submitted that the so-called 'policy' choices made in the 2013 Regulations to which the applicants take exception do no more that establish procedures to be followed in the assessment of applications for subsidiary protection which the State is bound to assess on an individualised basis by virtue of the Qualification Directive.

31. With regard to the applicants' contention that the amendments to the roles of both the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal could only be made by way of primary legislation, the respondent submits that the 2013 Regulations are made in compliance with and pursuant to the provisions of the European Communities Act 1972. In light of this, it is submitted that the Minister may provide that the functions set out in the Refugee Act 1996 shall be conferred on an appropriate body and be exercisable for the purposes of the 2013 Regulations. It is submitted that the Minister has an express power pursuant to s. 3(2) of the 1972 Act to include in the 2013 Regulations such incidental, supplementary and consequential provisions as appear to be necessary for the purposes of the regulations, including provisions repealing, amending or applying, with or without modification, other statutory provisions in the State. In this regard it is submitted that Articles 27 and 28 of the 2013 Regulations are required by the Minister to create a revised scheme for the determination of subsidiary protection applications in the State under the Qualification Directive and therefore are incidental, supplementary and consequential provisions of the regulations.

Findings:

32. Regulations under s. 3 of the 1972 Act may only be made if required to ensure that Ireland achieves a binding obligation placed upon it by a measure of European Union Law. In addition, section 3 may only be used to achieve implementation of a Union rule if the parent Directive or Regulation established adequate principles and policies governing the area.

33. Article 288 of the Treaty on the Functioning of the European Union says that Directives are binding "as to the result to be achieved". In order to figure out what obligations Ireland must meet under the Qualifications Directive, it is useful to ask: what is the result to be achieved by the Qualification Directive? This is another way of asking what the object of the Directive is. In my view, this is indistinguishable from asking what the policy of the Directive is.

34. One of the purposes of the Qualification Directive was to establish a form of protection complementary to asylum known as subsidiary protection and to ensure that this form of protection would be available in each of the Member States to third country nationals in fear of serious harm. Ireland had to ensure that it established mechanisms whereby such protection could be sought and granted. The provisions of Recital 6 are recalled which provide:

> "The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States."

35. Recital 24 provides:

> "Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention."

36. Recital 25 provides:

> "It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary

protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States."

37. Article 1 of the Qualification Directive:

> "The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted."

38. Article 4 of the Directive creates a firm obligation for each Member State to assess the relevant elements of an application for international protection in cooperation with the applicant. Article 2 defines 'international protection' as a request made by a third country national or a stateless person for protection from a Member State seeking either refugee status or subsidiary protection status.

39. In *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329, it was found that it would have been impossible for the State to meet the obligations of the Directive at issue in those proceedings without creating a criminal offence. The Supreme Court was satisfied that the period granted to permit investigation and prosecution came within s. 3(2) of the 1972 Act and was incidental, supplementary or consequential in relation to the obligation in the Directive. Here, in my opinion, it would similarly be impossible for the State to meet the binding effect which the Qualification Directive is designed to have unless Ireland identified a person empowered to receive and determine an application for international protection and to assess it in accordance with the rules set out in Article 4(3) thereof. An inescapable obligation of the Directive is the vesting of the function required to be carried out under Article 4 in an identified agency, office or person.

40. In the cases of both *Meagher* and *Maher* the Supreme Court makes reference to the test laid down by O'Higgins C.J. in *Cityview Press v. An Comhairle Oiliúna* [1980] I.R. 381:

> "In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving of effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits- if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power."

41. Denham J. in *Meagher*, after citing the above test of O'Higgins C.J. opined:

> "Applying the [*Cityview*] test to this situation the test is whether the ministerial regulations under s. 3 of the Act of 1972 are more than the mere giving effect to principles and policies of the said Act and the directives which are part of domestic law as to the result to be achieved.
>
> If the regulations contained material exceeding the policies and principles of the directives then they are not authorised by the directives and would not be valid under s. 3 unless the material was incidental, supplementary or consequential. In those circumstances if they were not incidental, supplementary or consequential the regulations would be an exercise of legislative power by an authority not so permitted under the Constitution. If it be within the permitted limits, if the policy is laid down in the directive and details only are filled in or completed by the regulations, there is no unauthorised delegation of legislative power."

42. Mr. Dillon Malone S.C. argues that although the Qualification Directive requires a decision maker to be identified, the degree of latitude left to Ireland in selecting who this person might be is such as to deprive the State of the facility of s. 3 of the 1972 Act,

which, he says, can only be deployed as an implementing mechanism if the parent Directive contains relevant principles and policies. Counsel's statement of the law is correct and fully accords with the decisions of the Supreme Court in *Meagher* and *Maher*. However, I disagree with his conclusions. Given that the Qualification Directive required that facility be established through which a third country national could make an application for international protection, and given that the manner in which such application be assessed is laid down by the Directive, the only matter left to Ireland in respect of these obligations was the identification of the person who would carry out this task. In my view, this is a classic "filling in the gaps" exercise in accordance with directions, principles and policies given by a parent Directive. The only matter with respect to subsidiary protection that Ireland can decide is who that person is and such supplementary, consequential or incidental matters as may be necessary to ensure that persons can make applications for international protection and that the decision maker takes the decision in accordance with the rules set out in the Directive.

43. Mr. Dillon Malone S.C. says that even if the identification of the decision maker was an inescapable obligation in the Directive, a transfer of functions to the Commissioner from the originally selected Minister for Justice, as decision maker, could not be described as an obligation necessitated by the Directive. If he is right about this, then the State could not, via secondary legislation, transfer the function to the Commissioner and the Regulations must fall. My view is that the State, being obliged to establish a facility for the assessment of applications for international protection, is entitled to rely on that obligation to vest the decision making role in whomsoever they please. Should it be decided to vest the function in some new body or agency, the transfer of such function to the new body is a lawful expression of the obligation to vest the function in an identifiable person or agency. That it is transferred does not reduce the nature of what the State is seeking to achieve by affecting the transfer - to ensure that there exists a person to whom application for international protection can be made.

44. If this conclusion is in error, and if it be the law that the act of transferring the function from the Minister to the Commissioner is not an expression of an EU law obligation, the respondent says that such transfer is covered by the provisions of s. 3(2) of the 1972 Act. I have no hesitation in supporting this proposition. Where European Union law obliges the State to identify a decision maker for subsidiary protection applications, the act of transferring the function of deciding such applications from person A to person B is incidental to that obligation or supplemental to that obligation. I have no hesitation in finding that the 2013 Regulations transferring the function from the Minister to the Commissioner are capable of being regarded as a measure which was incidental, supplementary or consequential upon an obligation arising from the Qualification Directive and thereby properly included in a Statutory Instrument designed to ensure that Ireland's obligations under EU law are fully met.

45. I reject the argument of the applicant that the transfer of power from the Minister to the Commissioner is "radical and momentous". I reject the argument that the transfer was a decision of principle and of policy not necessitated by obligations of EU membership. Identification of a decision maker is neither a matter of principle nor of policy. It is a mechanical administrative act involving only a choice as to who the person will be. It does not involve a choice as to what they will do or how they will do it.

The Definition of Torture:

46. Counsel for the applicants argues that the definition of torture contained in the 2013 Regulations fails to transpose lawfully the provisions of the Qualification Directive. The critical difference between the Directive and the 2013 Regulations is said to be that torture at the hands of both State and non-State actors may form the basis of a claim as to a fear of serious harm in the Directive whereas the 2013 Regulations limit such a claim to circumstances where torture is feared from State actors only. It is also submitted by the applicants that the new definition not only limits 'torture' to a State actor but also

expressly excludes "any such act that arises solely from, or is inherent in or incidental to, lawful sanctions" where no such limitation is placed by the Directive. Further it is submitted that a purposive approach to interpreting the definition will not help as it has specifically been grafted onto the 2013 Regulations from the Criminal Justice (United Nations Convention Against Torture) Act, 2000 (as amended).

47. In this regard, the applicant refers to the dicta of Feeney J. in the case of *N.H. v. Minister for Justice* [2007] IEHC 277 in which he address the definition of torture contained in the 2000 Act:

> "Article 15(b) of the Directive of 2004 identifies that serious harm consists of torture. As identified above, the respondent contends that prior to the implementation of the Directive of 2004, he was bound in all cases to consider and act in accordance with the Criminal Justice (United Nations Convention Against Torture) Act 2000 and could not have returned a person to his or her country of origin if to do so would constitute a breach of the Act of 2000. In the Act of 2000 torture was defined in s. 1(1) as meaning "an act or omission by which severe pain or suffering whether physical or mental, is intentionally inflicted upon a person". The definition of torture in s. 1(1) of the Act of 2000 was amended by s. 186 of the Criminal Justice Act 2006 by the insertion, after the word "omission", of the words "done or made, or at the instigation of, or with the consent or acquiescence of a public official". This amendment came into force on the 1st August, 2006.
>
> 47. The consequences of the amendment, contained in s. 186 of the Criminal Justice Act 2006, was to limit the definition of torture to acts or omissions done or made or at the instigation of, or with the consent or acquiescence of a public official. That limitation does not apply in article 15 of the Directive of 2004. Article 15, in identifying serious harm, refers at sub-para. (b) to torture or inhuman or degrading treatment or punishment of an applicant in the country of origin without such limitation. It follows that the consideration of the possibility of a person being potentially subject to torture prior to making a deportation order against that person under the Act of 2000, as amended by the Act of 2006 after the date of the amendment, would be on a different and more limited basis than that provided for in article 15 of the Directive.
>
> 48. Therefore, insofar as it is contended that the respondent, before making a deportation order on a date prior to the 10th October, 2006, was bound to consider and act in accordance with the Act of 2000 and, therefore, that no person would have been deported to their home state on foot of a deportation order made prior to the 10th October, 2006, if to do so would have fallen foul of what is now set out in relation to subsidiary protection in the Directive of 2004, would not be the case from the date of the amendment. The true position is that the definition of torture which the respondent had to consider subsequent to the implementation of the amendment contained in s. 186 of the Criminal Justice Act 2006 was narrower than that contained in art. 15 of the Directive."

48. The applicants contend that the basis of the claim for subsidiary protection has been indicated to be a fear of serious harm as within the meaning of Article 15 of the Directive and by definition this includes a fear of torture and a fear of inhuman and degrading treatment.

49. Counsel for the respondents submits that the applicants' complaint in relation to the definition of torture is hypothetical and premature. In this regard, it is submitted that no consideration has been given to the issue of whether the claims made by the applicants in

their application for subsidiary protection amounts to torture and thus it cannot be known if the applicants' claim is found not to amount to torture, whether that conclusion will depend on the differences contended for by the applicants. The respondents rely on the decision of *Cahill v. Sutton* [1980] I.R. 269 in which Henchy J. commented on the *locus standi* of the plaintiff:

> "The question which the Court has to consider is whether such an indirect and hypothetical assertion of constitutional rights gives the plaintiff the standing necessary for the successful invocation of the judicial power to strike down a statutory provision on the ground of unconstitutionality.
>
> …
>
> While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented."

50. Counsel submits that furthermore it remains the case that it is open to the applicants to plead all elements of 'serious harm' in their application to include 'inhuman and degrading treatment' and therefore the applicants are not limited to the claim of 'torture' and its alleged contextual difficulties.

51. It was also submitted that the even if the 2013 Regulations wrongly transpose the definition of torture, the decision maker is obliged to apply the provision of the Directive in preference to erroneous domestic implementing measures. In *Fratelli Constanzo v. Comune di Milano* (Case C-103/88) it was held that a municipal authority, like a court, was obliged by EU law to apply the provisions of a directive which are unconditional and sufficiently precise and to disapply any provision of national law which is inconsistent with such provisions.

Discussion:

52. On the day the applicant sought subsidiary protection in accordance with the regulations then in force a form was completed indicating that the basis of the claim was "torture or inhuman or degrading treatment….". In the text submitted with the form the applicant says that she fears serious harm from her family.

53. The respondent submits that there are a number of possible outcomes to the application. The applicant might be disbelieved in her narrative; it may be accepted that she faces inhuman or degrading treatment; or it may be accepted that she faces torture. It is submitted that in any of these eventualities, the alleged frailties in transposition as described above will cause no injury to her. The only circumstance in which she might be affected by the alleged infirmity is where the decision maker dismisses her claim because she fears torture from her family and torture from private sources is excluded as a basis for a claim for protection under the Irish regulations.

54. I accept that the Irish regulations have unlawfully narrowed the meaning of torture. The Directive does not limit its application to state actors and the Irish regulations impose such a limit. The 2013 Regulations prevent this applicant from claiming a fear of torture from non state actors and her narrative makes plain that she fears torture and /or

inhuman and degrading treatment at the hands of her family.

55. In my view it would be churlish to ignore this defect and leave the matter to an administrative decision maker with a suggestion that he or she should disapply the Irish Regulations and defer to the Directive.

56. Though it is not certain that this defect will have negative consequences for the applicant, my view is that she is entitled to engage with a lawful regime of subsidiary protection in circumstances where her claim embraces a fear of torture emanating from private actors. That she may be defeated in such a claim should not disentitle her from pursuing the claim as contemplated by the Directive.

57. The issue having been fully argued and the court having concluded that the definition of torture in the 2013 Regulations is bad in law, it would serve no purpose for the court to remain silent on the point. Given the extent of litigation in this area it is inevitable that the High Court will have to decide this issue in the future. As it happens I am aware that a case listed for hearing shortly makes this same complaint. It would serve no useful purpose for the argument in this case to be duplicated in the coming weeks. It would be wasteful of judicial resources, not to mention wasteful of the respondents own resources, to postpone determination of this point to another day. This court is neither requested nor required to disapply the offending provision of the Regulation. No order of certiorari is sought relative to the infirmity. Neither is the court requested to direct the decision maker to apply the Directive in preference to the domestic regulations. A declaration is sought that the definition of torture embodied in the 2013 Regulations is invalid as being inconsistent with article 15(b) of the Qualification Directive. I am satisfied that this is an appropriate Declaration to grant.