# High Court of Ireland Decisions



**Judgment**

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| **Title:** | DN -v- The Chief Appeals Officer |
| **Neutral Citation:** | [2017] IEHC 52 |
| **High Court Record Number:** | 2014 306 JR |
| **Date of Delivery:** | 16/02/2017 |
| **Court:** | High Court |
| **Judgment by:** | White Michael J. |
| **Status:** | Unapproved |

[2017] IEHC 52

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No. 306 J.R.]**

**BETWEEN**
**D N (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, A S), A S**
**APPLICANTS**

**AND**

**THE CHIEF APPEALS OFFICER, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL, IRELAND AND**

**THE MINISTER FOR SOCIAL PROTECTION**

**RESPONDENTS**

**JUDGMENT of Mr. Justice White delivered on the 3rd of February, 2017**

1. The applicants issued an *ex parte* docket on 26th May, 2014, together with a statement to ground application for judicial review, an amended statement and the

grounding affidavit of the second applicant, sworn on 24th May, 2014, with exhibits.

2. By order of leave of 26th May, 2014, Peart J. granted the applicants leave to apply by way of application for judicial review for the following reliefs:-

> (i) an order prohibiting the identification of the first and second named applicants, the first named applicant being a minor and the second named applicant being a person who has been granted international protection in the State;
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> (ii) an order of *certiorari* quashing the decision of the first named respondent dated 27th February, 2014, to refuse to backdate the applicants' application for child benefit in respect of and for the benefit of the first named applicant prior to 1st May, 2012;
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> (iii) a declaration that the first named applicant is entitled to the support and assistance derived from child benefit from the date of his birth and the second named applicant, his mother is entitled to receive child benefit in respect of and for the benefit of the first named applicant from that date in light of the granting of subsidiary protection status to the said second named applicant on foot of her application for international protection which was made in the State on or about 26th January, 2006, or in the alternative that they are so entitled from the date of the application for child benefit made on behalf of the first named applicant by the second named applicant on 18th February, 2008;
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> (iv) a declaration that ss. 246(7)(b) and 246(8)(c) of the Social Welfare Consolidation Act 2005, as amended are in breach of European Union law including the Charter of Fundamental Rights of the European Union repugnant to the Constitution and incompatible with the European Convention on Human Rights;
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> (v) a declaration that the delay in granting subsidiary protection to the second named applicant was inordinate and in breach of the applicants' rights and of the duties of the second, third and fourth named respondents under European Union law, the Constitution and section 3 of the European Convention on Human Rights Act 2003;
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> (vi) as a consequence of the delay referred to in para. V, damages for the loss of child benefit in respect of the first named applicant caused by the unlawful delay in processing and determining the second named applicant's application for subsidiary protection;
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> (vii) such further or other order as to this Honourable Court shall meet; and
>
> (viii) an order providing for costs.

3. A motion was issued on 29th May, 2014, originally returnable for 15th July, 2014. A statement of opposition was filed and served on 10th November, 2014. The following further affidavits were filed and served.

- Affidavit and exhibit of Noel Dowling, Principal Officer, in the Reception and Integration Agency of second respondent dealing with the system of direct provision sworn on 11th November, 2014.

• Affidavit of Chris Carroll, Assistant Principal Officer of the second respondent dealing with the application for subsidiary protection.

• Affidavit of Tina Burns, Assistant Principal Officer with responsibility for child benefit of the fifth respondent sworn on 10th November, 2014, together with exhibits.

• Affidavit of Patrick McKenna, manager of Mosney Accommodation Centre, Mosney, Co. Meath, together with exhibits sworn on 12th November, 2014,

• Second affidavit of Patrick McKenna and exhibit sworn on 17th November, 2014,

• Supplementary affidavit and exhibits of second applicant sworn on 13th March, 2015.

• Affidavit of Michael Farrell, Solicitor for the applicants together with exhibits sworn on 16th March, 2015.

• Second affidavit of Tina Burns sworn on 12th March, 2015.

• Affidavit of Ben Ryan, sworn on 2nd June, 2015, together with exhibit.

• Supplemental affidavit of Michael Farrell sworn on 13th August, 2015, together with exhibits.

• Affidavit of Mary O'Sullivan, Principal Officer in the International Division of the fifth respondent sworn on 9th November, 2015, together with exhibit.

• Third affidavit of Tina Burns sworn on 9th November, 2015, together with exhibit.

• Second affidavit of Ben Ryan sworn on 10th November, 2015, together with exhibits. The matter was at hearing on 4th 5th May and 28th, 29th and 30th June, 2016, and judgment was reserved.

**Brief History of Application for Refugee Status and Subsidiary Protection**

4. The second applicant and her husband, P, reside in North County Dublin and are the parents of the first applicant who was born in Ireland on 31st December, 2007. On 26th January, 2006, the second applicant came to Ireland and applied for asylum seeking refugee status. Her husband also applied. Their application for refugee status was refused in the case of her husband on 11th January, 2007 and in the case of the second applicant on 2nd March, 2007. The second applicant and her husband then applied for subsidiary protection pursuant to the European Communities (Eligibility for Protection) Regulations 2006 (Statutory Instrument No. 518 of 2006) and made further representations for leave to remain in the State pursuant to s. 3 of the Immigration Act 1999. These applications were made on behalf of the second applicant's husband on 12th March, 2007 and in her own case on 10th May, 2007. Separately, judicial review proceedings were issued in respect of the refusal of the Refugee Appeals Tribunal to grant refugee status. Those proceedings were issued on 22nd May, 2007 [2007 No. 581], and were listed for hearing on 13th February, 2009. The second applicant's solicitors had sourced significant new country of origin information and it was agreed

that the judicial review proceedings be struck out on 4th February, 2009. The second applicant and her husband requested to re-enter the refugee determination procedure but this was refused on 14th December, 2009.

5. By letters of 6th January, 2010 and 25th January, 2010, the second applicant and her husband made applications for subsidiary protection. When the second applicant made an application for subsidiary protection on 10th May, 2007, consideration of same was suspended pending the judicial review proceedings in respect of the Refugee Appeals Tribunal decision. The effective date of her application for subsidiary protection was the 25th January, 2010. Further representations were made by the second applicant on 1st February 2010,17th April, 2010 and 18th January, 2011. The second applicant was granted subsidiary protection by letter of 1st May, 2012, from the Irish Naturalisation and Immigration Services (INIS).

**Applications made for Child Benefit by the Second Named Applicant**
6. The second applicant made several applications for child benefit in respect of the first named applicant. The first application was made on 4th April, 2008. This was refused on 17th May, 2008. She made a further application on 27th September, 2008, received by the department on 22nd October, 2008 and this was refused on 11th February, 2009. These refusals were appealed and the appeal was rejected on 7th September, 2009. She made a third application on 27th February, 2013.

7. By letter of 24th April, 2013, the second applicant was notified that she had been awarded child benefit for the first named applicant with effect from 1st May, 2012. She appealed that decision and by decision communicated to her on 27th February, 2014, the appeals officer rejected the appeal. It is that decision of the appeals officer which is the subject of these judicial review proceedings.

8. This decision recites as follow:-

> "The appellant sought to have the child benefit claim awarded from either the date her child was born or the date of her application. She has contended her situation is similar to that of persons granted refugee/asylum status in accordance with the judgment of Cook J. of February 2011, in *D.(a minor) v. Refugee Applications Commissioner & Ors* when he ruled that the declaration of a person is a refugee is merely the confirmation of a pre-existing state.
>
> Reference is also made to the acceptance of this principle by an appeal officer in a case reported in the Appeals Office Annual Report 2011. It is claimed that subsidiary protection is complimentary to the granting of refugee status and the same considerations should apply that the circumstances pertaining at the date it is recognized existed at the date of application.
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> The deciding officer in commenting on the grounds of appeal did not consider the Cook judgment, was relevant as the appellant had not been granted refugee status.
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> The deciding officer also referred to s. 246(7)(b) of the Social Welfare Consolidation Act 2005. This provides that persons who have made an application to the Minister for Justice are not habitual residents where a determination on their application is pending:-
>
> '(7) The following persons shall not be regarded as being habitually resident in the State for the purpose of this Act-

(b) a person in respect of whom an application for subsidiary protection has been made under Regulation 4 of the Regulations of 2006 and where a determination under that Regulation has not yet been made in respect of such application.'

Acts of the Oireachtas are regarded as constitutional until ruled otherwise by the High Court or Supreme Court -Article 34 of the Constitution. Equally, s. 246(8)(c) provides that where a person is granted permission to enter and reside in the State under Regulations 4(4) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006), he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration was granted.

'(8) For the purpose of this Act, where a person—

(c) is granted permission to remain in the State under Regulation 4(4) of the Regulations of 2006,

he or she shall not be regarded as being habitually resident in the State for any period before the date on which the permission referred to in paragraph (c) was granted.'

I consider I am bound by the provisions of s. 246(7)(b) and s. 246(8)(c). To find in the appellants' favour, I would have to disregard these provisions. I do not accept it is open to me to make a determination requiring consideration of the constitutionality of social welfare legislation. If the appellant wishes to challenge the authority of the legislation, this is a matter proper to the Superior Courts.

I note the appellant sought an oral hearing of the appeal. I am of the view that having regard to the issue involved and the extent of legal submissions made on her behalf by Michael Farrell, Solicitor, an oral hearing is not required and the case can probably be determined on the documentary evidence."

**SCOPE OF LEAVE APPLICATION.**

9. The applicants have referred to the earlier applications for child benefit and their refusal. The challenge before this Court and the leave order of Peart J. of 26th May, 2014, is in respect of the decision of the appeals officer of 27th February, 2014. The applicants are not entitled to review the earlier decisions except they can argue that the decision of 27th May, 2014, was wrong in that it was not backdated to the date of birth of the first named applicant, or the date of the first application for child benefit.

**SUBMISSIONS.**

10. The applicants have made the following submissions:-

(i) That s. 246 of the Social Welfare Consolidation Act 2005, was amended by the insertion of s. 246(7)(b) and s. 246(8)(c) by s. 15 of the Social Welfare and Pensions (No. 2) Act 2009, and were not present in the Act when the second applicant originally applied for child benefit and also applied for international protection and thus cannot be applied retrospectively.

(ii) The appeals officer failed to give any reason as to why an oral hearing was not held.

(iii) That the entitlement to subsidiary protection granted to the applicants arose when the application for subsidiary protection was made.

(iv) That there should not be any discrimination between the beneficiary of subsidiary protection and the beneficiary of refugee status.

(v) That child benefit is a core benefit pursuant to Article 28 of Council Directive 2004/83/EC of 29th April, 2004, implemented in Ireland by S.I. No. 518 of 2006.

(vi) That there is a requirement to backdate benefits.

(vii) As the applicants were lawfully in the State and ultimately required subsidiary protection, that the habitual residence condition was fulfilled from the outset.

(viii) Article 25 of the Qualification Directive , directs that the best interests of the child shall be a primary consideration for Member States when implementing the provisions of the chapter that involves minors.

(ix) That s. 246(7)(b) and s. 246(8)(c) of the Act are unconstitutional and contrary to European Union law.

(x) That there was inordinate delay in finalising the second applicant's application for subsidiary protection., which breached the applicants constitutional, E.U. and Convention rights.

A summary of the respondents' position is that:-

(a) there was no delay in the processing of the mother's subsidiary protection application;

(b) that the mother failed to take any action in respect of her application and is precluded from doing so in these proceedings on the grounds of delay;

(c) that even if there was a delay, the applicants have suffered no loss as a consequence and have failed to adduce evidence of any such loss;

(d) that throughout the time that the mother's subsidiary protection application was being processed, the State provided for the applicants' material needs in a cashless manner through the direct provision system;

(e) that the applicants had a limited entitlement to reside in the State for the purpose of having a protection application examined and, therefore, were not eligible for social welfare benefits during that period;

(f) that the granting of subsidiary protection status is not retrospective in nature, the applicants are entitled to prospective benefits but are not entitled to have their rights backdated as they now assert;

(g) that the minor and mother have no automatic right to child benefit, their entitlement derives from compliance with the conditions set out in

the Social Welfare legislation;

(h) that the applicants have failed to establish any or any reasonable basis on which it could be alleged that the relevant legislation is unconstitutional.

**Subsidiary Protection**

11. The status of subsidiary protection granted to the second applicant is defined in Council Directive 2004/83/EC of 29th April, 2004, implemented in Ireland by S.I. No. 518 of 2006. There has been a recent update of the Regulations and subsidiary protection is now governed by the European Union (Subsidiary Protection) Regulations 2013, S.I. No. 426 of 2013. The 2006 Regulations apply to this case.

12. The recitals in the Directive state in the following paragraphs:-

> "5. The Tampere Conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.
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> …
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> 33. Especially to avoid social hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence.
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> 34. With regard to social assistance and health care, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, insofar as they are granted to nationals according to the legislation of the Member State concerned."

13. Subsidiary protection is defined in Article 2, as follows:-

"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."

14. Article 28 states:-

> "1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has granted such statuses, the necessary social assistance, as provided to nationals of that Member State.
>
> 2. By exception to the general rule laid down in paragraph 1, Member

> States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals."

15. In respect of subsidiary protection in *V.N. v. Minister for Justice and Law Reform & Anor* [2012] IEHC 62 at para. 19, Cooke J stated:-

> "…Subsidiary protection is, therefore, an extended form of international protection which complements refugee status by affording protection to an individual who is genuinely at risk of 'serious harm' in the country of origin but who does not qualify as a refugee; invariably because the source of the serious harm in question lacks one of the essential reasons for persecution upon which the Geneva Convention is based - the so-called Convention nexus. It is incorrect, therefore, to regard eligibility for subsidiary protection as a wholly distinct and stand alone right attracting the need for a procedure which duplicates that of the asylum process."

16. The argument that subsidiary protection is the declaration of an existing right equally applies to subsidiary protection and refugee status. The court accepts that it is a declaratory act. The decision maker in an application for subsidiary protection is entitled to take into account relevant matters and events in respect of the country of origin of the applicant, at the date of the application and during the decision making process. This is obvious from Regulation 5(1)(a) of S.I. No. 518 of 2006 which states:- the following matters shall be taken into account by a protection decision -maker for the purpose of making a protection decision:-

> "all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied."

17. The court in its recent judgment of *Agha & Anor v. Minister for Social Protection & Ors* and in *Osinuga & Ors v. Minister for Social Protection & Ors*, judgment of this Court of 17th January, 2017, [2017] IEHC 6 at paras. 27 - 41 of the judgment, reviewed the law on refugee status and the submission that when an asylum seeker is granted refugee status, this is a recognition of an existing status arising from that person's arrival in the State from which he or she seeks asylum and that it falls that if granted refugee status entitlements to social welfare should be backdated to the date of first application for asylum. The court rejected that argument for the reasons set out in that judgment and as subsidiary protection is complimentary to refugee status, the same interpretation of the law applies. The granting of subsidiary protection does not oblige the State to backdate child benefit which the court accepts is a core benefit.

**The Constitutionality of Section 246 of the Act**

18. The effect of s. 246(7)b already recited in the Appeals Officers determination is to exclude a person applying for subsidiary protection from social welfare entitlements as those entitlements including child benefit require habitual residence. Section 246(8)(c) prevents the fifth respondent from backdating any benefits prior to the date on which the declaration of subsidiary protection was granted.

19. The court has already considered the constitutionality of these provisions in the *Agha* and *Osinuga* judgment in the context of the requirement of habitual residence and the provisions of Article 23 and 28 of the Directive and the Charter of Fundamental Rights and has concluded that the relevant provisions of the Act are constitutional and do not offend the Directive or the Charter of Fundamental Rights. The court also concluded that the habitual resident requirement for child benefit was not discriminatory, and that child benefit was not an automatic right of the child or the qualified adult. Accordingly the refusal did not offend Article 25 of the Directive.

20. The legislation has not been applied retrospectively. On the date of the application

for child benefit on 27th February, 2013, s. 246 of the Social Welfare Consolidation Act 2005, had been amended. It was within the discretion of the appeals officer to refuse an oral hearing.

**The Delay in granting the Second Applicant Subsidiary Protection**

21. There was a delay in granting the second applicant subsidiary protection. The court accepts because of the complicated history of the second applicant's application for refugee status, previous judicial review proceedings and other matters that the effective date of her application, was 25th January, 2010.

22. Administrative authorities should be conscious of the length of time applicants seeking asylum in this country spend in direct provision whether by way of seeking refugee status, subsidiary protection or other consent mechanisms. The direct provision system meets the basic needs of applicants but is far from ideal. It is accepted by the second respondent that the pull factor of immigration is an important policy concern and this is set out at paras. 35 - 37 of the affidavit of Noel Dowling sworn on 11th November, 2014, which states:-

> "35. It was and continues to be a serious concern that granting entitlement to social welfare and rent supplement would give rise to a pull factor such that the numbers of new protection applicants entering the State could rise significantly. Notwithstanding the effect on services that would ensue should those currently in the asylum process in Ireland (both inside and outside direct provision) be granted full access to work, social welfare and housing, the pull factor created by such a decision could potentially attract the legal immigrants in unsustainable numbers. EU countries that are perceived to have more advantageous arrangements for protection applicants experience a proportionately higher number of applicants.
>
> 36. When the United Kingdom decided to introduce a direct provision system in 1998, Ireland immediately experienced a surge in a number of asylum seekers in 1998 -1999, prior to introducing a similar direct provision system. As set out above given the common travel area, Ireland, could not maintain a system that was fundamentally different to the United Kingdom and deemed to provide more generous arrangements for the protection applicants.
>
> 37. That position still applies in particular given the common travel area and the large number of illegal immigrants residing in the United Kingdom. This was estimated by the London School of Economics in 2009 to be approximately 618,000 around 70% of whom live in London. That study relied on census data of 2001, and had a margin of error of 200,000. Having regard to the existence of the common travel area, there is the serious concern that should protection applicants be allowed access to full social welfare housing, and labour rights, Ireland could very quickly find itself dealing with an asylum crisis of significant proportions. The State would therefore be faced with immediate and considerable drain on its resources."

23. The second respondent with responsibility for immigration, faces serious issues relating to immigration policy and the maintenance of the common travel area with the United Kingdom. The direct provision system has been introduced and operated for that reason.. However very lengthy periods in direct provision are undesirable. The second applicant has fairly summarised the difficulty in para. 11 of her supplementary affidavit sworn on 13th March, 2015, when she stated at para. 11:-

> "11. If the information provided by the respondents in regard to direct provision was given in response to my statement that the living conditions in which we were placed were distressing and damaging, I must repeat that my complaint in that regard was not primarily about the amount of money provided to us or the physical facilities provided at Mosney but about the restricted, institutional regime to which we had to conform over a lengthy period of time and especially that we were not permitted to work. My husband is a qualified engineer who ran a successful business in Iran. I am a qualified nurse. We found it deeply frustrating that we could not use our professional skills and expertise to provide for our son and establish an individual family home for him instead of the institutionalised regime in Mosney."

24. While the court accepts that s. 246(8) is constitutional and does not offend the EU Directive, it has the effect of removing any discretion from the fifth named respondent when considering the backdating of claims.

25. This is different from the treatment of an Irish national which is explained in the second affidavit of Tina Burns of 12th June, 2015, at paras. 20 and 21 when she states:-

> "20. There is a limit to the backdating of any child benefit payable in respect of an Irish national in any event. There is a requirement that a child benefit claim must be made within "the prescribed time," that being within twelve months 'from the day on which apart from satisfying the conditions and making a claim, the claimant becomes a qualified person within the meaning of s. 220 (Article 182(k) of S.I. No. 142 of 2007).
>
> 21. If a claim for child benefit is received outside of the prescribed time, then late claim legislation applies and payment is made from the month after receipt of the claim unless the claimant can show good cause for the claim being late. If good cause is shown the claim will be backdated to the date that entitlement would first have existed. In the case of other social welfare schemes, the legislation limits to six months, a period which can be backdated when a claim is late, but no such limitation applies in the case of child benefit."

26. Thus, if the second respondent or its agents are responsible for culpable delay in considering a subsidiary protection application, the fifth respondent has no discretion pursuant to present social welfare legislation to allow for that if a subsidiary protection claim is successful, while Irish nationals who qualify for child benefit if they can show good cause can have the claim backdated to the date of entitlement, and while they to establish habitual residence and be a qualified person, Section 246(8) specifically applies to those seeking asylum.

27. If an applicant for refugee status or subsidiary protection or other application to remain in Ireland is in direct provision for a very lengthy period of time, it is incumbent on the second respondent to ensure that their applications are processed within a reasonable time. Any applicant also has the responsibility to process his or her application within a reasonable time and the processing agency cannot be held responsible for the delays attributed to applicants, which includes any legal challenge to the process.

28. The substantive information required by the Irish Naturalisation and Immigration Service was sent on 1st February and 17th April, 2010. The letter of 18th January, 2011, from the applicants' solicitors only had references.

29. It was open to the service to make a decision on the subsidiary protection

application subsequent to 17th April, 2010. The decision to grant subsidiary protection was made on 1st May, 2012, two years later. No explanation has been proffered for this delay. The court has considered the fact that the second applicant did not apply for mandamus to compel a decision on subsidiary protection, but as the issue in this judicial review, is that of child benefit, and the operation of Section 246(8) of the act, it would be unfair to refuse relief on that ground.

30. While not binding this Court approves the opinion of Advocate General Bot in Case C-277/11, *M. v. Minister for Justice, Equality and Law Reform & Ors*, when he stated as follows:-

> "113. It is clear from the documents on the file that the procedure for examining Mr. M's asylum application took six and a half months and that concerning his application for subsidiary protection, 21 months. Mr. M. was therefore informed about his situation on conclusion of a procedure that had lasted a little over two years and three months.
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> 114. That length of time seems to me to be manifestly unreasonable. Although in Ireland examination of the application for subsidiary protection is not subject to the procedural rules mentioned in Article 23(2) of Directive 2005/85 - which provides that Member States must ensure that the procedure for examining applications for international protection is concluded as soon as possible and, where a decision cannot be taken within six months, that the applicant is either informed of the delay or receives information on the time-frame - the fact remains that the competent national authority is obliged to ensure, when it adopts a decision falling within the scope of EU law, observance of the right of the person concerned to good administration, which constitutes a general principle of EU law.
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> 115. Applications for subsidiary protection, like applications for asylum, must thus be the subject of a thorough examination, taking place within a reasonable period of time, as the prompt dispatch of the proceedings contributes not only to the applicant's legal certainty but also to his integration."

31. The application for subsidiary protection should have been finalised by at least 1st May, 2011. The delay combined with the effect of s. 246(8), breached the applicants constitutional and E.U. law rights.

32. The applicants are entitled to a declaration pursuant to para. 5 of the leave order with the deletion of s. 3 of the European Convention on Human Rights Act 2003.

33. I, refuse the reliefs in paras. 1 - 4 and in declaration 5 delete s. 3 of the European Convention on Human Rights Act 2003 and grant the following declaration:-

> "A declaration that the delay in granting subsidiary protection to the second named applicant from 1st May, 2011, to 1st May, 2012, was inordinate and in breach of the applicants' rights and of the duties of the second, third and fourth respondents under European law, and the Constitution."

34. The court declines any reference to the Court of Justice of the European Union.

35. The second applicant is entitled to compensation, and I will hear the parties on that

matter.