Neutral Citation: [2015] IEHC 67

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 152/153 J.R.]

BETWEEN

K.A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the day of 2nd day of February, 2015

1. By order made on 4th March, 2013, the applicant, a Somali national who had been granted refugee status in Hungary, was granted leave to apply for judicial review to seek an order of *certiorari* quashing the decision of the respondent (the Minister) dated 22nd February, 2013, refusing to process and determine the applicant's application for subsidiary protection and/or an order of *mandamus* requiring the respondent to process it in the following circumstances. A deportation order was issued against the applicant dated 15th November, 2011. Judicial review proceedings were then initiated and injunctive relief was obtained on the basis that there were substantial grounds for believing that the deportation of the applicant to Hungary would expose him to a real risk of torture, inhuman or degrading treatment [2011 No. 118 J.R.]. This was based on the applicant's personal experience of destitution as a refugee in Hungary and information obtained on the situation faced by those granted asylum in Hungary by the applicant's solicitor. An application for subsidiary protection was submitted by letter dated 9th December, 2011. The applicant's judicial review proceedings were settled in March 2012, on foot of which the deportation order was revoked on 4th April, and the respondent undertook to process and determine the applicant's applications for subsidiary protection and leave to remain in the State pursuant to s. 3 of the Immigration Act 1999.

2. By letter dated 22nd February 2013, the Minister wrote to the applicant's solicitor stating that it was not intended to process the subsidiary protection application because the Minister was precluded by law from doing so.

3. It is clear that the compromise reached in respect of the judicial review proceedings was based on different understandings by the parties as to the reason why the deportation order had issued. The applicant maintains that at all material times, and based on correspondence with solicitors for the Minister, he was a person in respect of whom refugee status had been refused by the Minister under s. 17 of the Refugee Act 1996 (as amended). Consequently, the applicant considered that he was entitled to apply for subsidiary protection. The Minister now maintains that the settlement terms were agreed on his behalf in circumstances in which a declaration of refugee status had not been refused by the Minister under s. 17, but rather it had been decided not to admit the applicant to the asylum process because he had been granted refugee status in Hungary and was not claiming that he had any fear of persecution for a Convention reason there. The Minister, therefore, declined to process the subsidiary protection application because the applicant, notwithstanding the terms of settlement, was not a person who was a "failed asylum seeker" and was, not lawfully entitled to seek or obtain subsidiary protection under s. 17(4) of the Act. In those circumstances, the Minister contends that it was then appropriate to consider the applicant's deportation under s. 3 of the Immigration Act 1999.

The History of the Case

4. The applicant is a Somali national from the lower Jubba region of Somalia. He arrived in Ireland on 21st January 2009, and applied for refugee status.

5. The applicant's fingerprints were transmitted to the Eurodac Central Unit in Luxembourg where they were found to match fingerprints taken in Hungary on 24th July, 2006. The applicant had been recognised as a refugee by the Hungarian asylum authorities on 2nd November 2006, under the name M.A.S., and was provided with a travel document for recognised refugees under the Geneva Convention on 9th December 2008. The Office of Immigration and Nationality in Hungary, by letter dated 3rd February 2009, confirmed these matters and also proposed that the applicant could be issued with a one-time travel document by the nearest Hungarian Embassy and could travel back voluntarily to Hungary. ORAC then informed the applicant, by letter dated 12th February, 2009, of the information which was in its possession concerning the granting to him of asylum in Hungary. In those circumstances, ORAC declined to admit his application for refugee status. The letter stated:

> "It has come to our notice that you were granted asylum in Hungary. As you have not claimed a fear of persecution in that State, and in accordance with section 17(4) of the Refugee Act, as amended, the Minister is precluded from granting a declaration that you are a refugee. No purpose would be served by investigating your claim. Accordingly, your application is not being admitted for processing. The file in your case is now being forwarded to INIS who will be in contact with you in due course."

6. Section 17(4) of the 1996 Act provides that:

> "The Minister shall not give a declaration to a refugee who has been recognised as a refugee under the Geneva Convention by a state other than the State and who has been granted asylum in that state and whose reason for leaving or not returning to that state and for seeking a declaration in the State does not relate to a fear of persecution in that state."

7. The applicant failed to disclose to the Refugee Applications Commissioner that he had been in Hungary or that he had been declared a refugee there. He went further and contended that information obtained from Eurodac was a mistake. Furthermore, in 2008, the applicant had been issued with a travel document at a time when he claimed to the Refugee Applications Commissioner that

he was in Somalia, having claimed that he travelled to Ireland in January, 2009 by air from Somalia via Dubai and one unknown transit point, but did not supply any documentation in the course of making an application to ORAC to verify his history. He states in his affidavit that he took the decision not to disclose his asylum status in Hungary because he did not wish to be sent back to Hungary where he said he was rendered destitute.

8. In an affidavit sworn in the previous judicial review proceedings [2011 No. 118 J.R.], the applicant described how, having been granted asylum in Budapest, he was not offered any support and was required to leave the Refugee Reception Centre in which accommodation had been provided to him by the Hungarian authorities. He received no accommodation or social assistance in any form and made his way to Budapest where he hoped to obtain work. He could not speak Hungarian and had no possibility of obtaining employment. He had no access to welfare support in Hungary and had no means to pay for private rented accommodation. He became destitute without any means of accessing accommodation, food or other basic subsistence requirements. He stated that he slept on the streets of Budapest and attended a local Mosque to wash and obtain shelter when possible. At the Mosque, he met a number of other Somali nationals who were in the same position. He could not travel to any other European Union State or return to Somalia. He relied on local people who worshipped in the Mosque to give him food, water and blankets. He became ill and suffered from bad frostbite, a chronic cough and Bronchitis. After approximately three months, he knew he could not survive in Hungary and decided to return to Somalia in the hope that the situation there might have improved. He remained in Hungary for two months following the granting of refugee status. No claim was made to the Commissioner that he was in fear of persecution for a Convention reason in Hungary.

9. On 31st December, 2006, some persons whom he befriended in the Mosque in Budapest assisted his return to Somalia via Djibouti and Dubai. He claimed that he remained in Somalia between January, 2007 and 16th January, 2009. He described incidents in which he had been assaulted and seriously injured in attacks on his family home. Having left his mother, wife and three children in Mogadishu, he met an agent who arranged for him to travel to Europe in order to apply for asylum again. His family savings were used to pay for this agent. He states that in early January 2009, he was informed by his aunt that his wife and children had been killed when the family home had been set on fire.

10. He then claimed that he arrived at Dublin Airport on 21st January 2009, in order to claim asylum and applied for refugee status on arrival, using his correct address and giving a truthful account of the grounds for claiming asylum. However, he did not refer to his previous application for asylum in Hungary. Though he completed an application form ASY1 and answered the various questions in a questionnaire which he was required to complete and formed the basis of his application, he was not granted a s. 11 interview with the Refugee Applications Commissioner because the Eurodac information indicated that he had refugee status already in Hungary.

11. The applicant claimed that by letter dated 11th May, 2009, he received a notice of a proposal to deport him pursuant to s. 3 of the Immigration Act 1999. He states that he sought legal advice from the Refugee Legal Service. Though he believed an application for leave to remain had been submitted by the Refugee Legal Service in Dublin on his behalf prior to his transfer to Galway and the adoption of his file by the Refugee Legal Services there, it had not. The proposal made clear that it was intended to consider his deportation because he had been recognised as a refugee in Hungary and was unlawfully in the state, and that the Minister was of the opinion that his deportation would be "conducive to the common good". By letter dated 15th November, 2011, the applicant was informed that the Minister made a deportation order against him on 8th November. Thereafter, the applicant retained solicitors on 26th November, and attended at the Garda National Immigration Bureau, as required, on 6th December. He feared being returned to Hungary if removed from the State as he believes that he would be destitute there. He also feared removal to Somalia.

12. The deportation order was made following an Examination of File carried out on 1st July, 2011, by an Executive Officer of the Repatriation Unit which was subsequently approved by a Higher Executive Officer and Assistant Principal Officer on 6th July. The case was considered under s. 3(6) of the Immigration Act 1999, and each of the matters which must be addressed pursuant to the section was considered in accordance with the information which he provided. It was stated that he had been in the State for approximately two years at the time of writing. He was 33 years old and his wife and children were said to be in Somalia. He had no connections to the State other than that he resided illegally here, having been granted refugee status in Hungary. There was nothing on the file to suggest that he should not be returned to Hungary. Representations were received under s. 3 on 21st May, 2009, signed by the applicant but written in a language which appeared to be Somali. No further representations from or on behalf of the applicant were received. It was stated that all legible information had been given full consideration.

13. In respect of s. 5 of the Refugee Act 1996 (prohibition of refoulement), it was noted that the applicant claimed to have a fear of persecution on ethnic grounds in Somalia. He had been granted refugee status in Hungary and would be provided with a travel document by the Hungarian Embassy to return to Hungary. The Hungarian authorities accepted that the applicant was in need of protection from being returned to Somalia. It was noted that:

> "In order to join the EU as a Member State, Hungary has fulfilled certain parameters relating to democratic stability, human rights and the rule of law. Country of origin information (link below) confirms the Hungarian Government provides protection against the expulsion of and the return of refugees to countries where they fear persecution . . . it is clear that there are no refoulement issues involved in returning the applicant to Hungary. I have considered all the facts of this case and I am satisfied that repatriating (the applicant) to Hungary is not contrary to s. 5 of the Refugee Act 1996, as amended, in this instance."

The provisions of s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000 were also considered, and it was determined that returning the applicant to Hungary was not contrary to the section. The applicant's rights under Article 8 of the European Convention on Human Rights were also considered and it was concluded that his deportation would not give rise to a breach of those rights.

14. The deportation order signed on 8th November by Mr. Noel Waters on behalf of the Minister, contained a Recital acknowledging that the applicant was "a person in respect of whom a deportation order might be made under s. 3(2)(i) of the Immigration Act 1999 which permits the Minister to make a deportation order in respect of 'a person whose deportation would, in the opinion of the Minister, be conducive to the common good'." The reason given in the order is the same as the reason furnished in the earlier letter which gave notice of the proposal to consider his deportation on 11th May, 2009. The court is satisfied that this was not a deportation order made pursuant to s. 3(2)(f) which allows the Minister to deport "a person whose application for asylum has been refused by the Minister". Unfortunately, the letter giving notice to the applicant of his deportation dated 15th November, 2011, contained an error. It states:

> "The reasons for the Minister's decision are that you are a person whose application for a declaration as a refugee has been refused. Having had regard to the factors set out in s. 3(6) of the Immigration Act 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of the public policy and the common

> good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in the State."

It is clear that the order was made, having regard to the provisions of s. 3(2)(i) and not s. 3(2)(f). This was also clear from the notice of intention to deport the applicant dated 11th May, 2009. The court is satisfied that the covering letter was mistaken, insofar as it referred to a refusal of refugee status as the reason for the deportation.

15. The applicant initiated proceedings [2001 No. 118 J.R.] on 14th December 2011, seeking to quash the deportation order. The main ground advanced was that substantial grounds existed for believing that the applicant's deportation to Hungary or Somalia would expose him to a real risk of torture, inhuman or degrading treatment in breach of Article 40.3 of the Constitution, Article 3 of the European Convention on Human Rights, Article 4 of the Charter of Fundamental Rights, s. 5 of the Refugee Act 1995 (as amended) and s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000.

16. These proceedings were compromised, and in accordance with the terms of settlement agreed between the parties, the deportation order was revoked on 4th April 2012, which was notified to the applicant on the same date. The terms upon which the judicial review proceedings were struck out by this Court were confidential, but in the course of this application, it was accepted that one of the terms set out in the letter was as follows:

> "3. The Minister will consider the application submitted on the applicant's behalf by Brophy Solicitors by letter dated 9th December 2011 in accordance with (i) the application for subsidiary protection pursuant to Directive 2004/83/EC (the EU Qualification Directive) and the European Communities (Eligibility for Protection) Regulations, Statutory Instrument No. 518 of 2006, and (ii) the application for humanitarian leave to remain pursuant to s. 3 of the Immigration Act 1999."

17. A letter dated 23rd September, 2009, had also issued "To Whom It May Concern" from the Repatriation Unit of the Irish Naturalisation and Immigration Service (INIS) which stated:

> "This is to state that (the applicant's) application for asylum in the State has been refused by the Minister for Justice, Equality and Law Reform.
>
> Consideration is being given at present under s. 3 of the Immigration Act 1999 as to whether (he) should be given leave to remain in the State or (be) returned to his country of origin. The Department is currently not in a position to issue (him) with an identification document."

If the reader had any queries, he/she was directed to write to the Repatriation Section of the Department of Justice, Equality and Law Reform or contact them by telephone.

Post-Agreement Conduct

18. On 10th April 2012, the applicant's solicitor submitted a letter from his doctor in Galway supporting his application for subsidiary protection (previously submitted) which was acknowledged as received by the Department by letter dated 14th April, 2012. On 31st August 2012, correspondence was submitted in respect of the applicant's accommodation which was acknowledged as received by the Department by letter dated 5th September. On 10th September, a further letter, confirmed an appointment with SPIRASI, and was acknowledged as received by the Department by letter dated 14th September. Also, by letter dated 10th September, the applicant's solicitor wrote to the Reception and Integration Agency and referred to the fact that the residence where the applicant was staying was closing and requesting that he be transferred to a residence in Dublin in order to facilitate his ongoing therapy at SPIRASI. Another letter was submitted from the applicant's doctor in Galway on 12th September which was also acknowledged as received by the Department by letter dated 17th September. Correspondence from SPIRASI was submitted to the Department on 19th September, which was acknowledged on 24th September. By letter dated 28th November, the applicant's solicitor submitted a medical report from SPIRASI in support of his account of the severe treatment which he had suffered in Somalia and requested that the Department determine the subsidiary protection application "without any further delay", and explained that the applicant "urgently need(ed) to access proper health services, including psychiatry, which (he) cannot do while (he) continues residing in Direct Provision accommodation" and because he had no other way of accessing psychiatric services at present. This letter was acknowledged by the Department on 5th December. A further submission was made on 11th December which enclosed a letter from the applicant and the Health Services Executive and urged the Department to take the applicant's medical circumstances into consideration in the determination of his application and requested that every effort be made to determine his application as expeditiously as possible. This was acknowledged by letter dated 13th December. This request was repeated in a further letter dated 5th February 2013, and acknowledged the following day. During this correspondence, it was never suggested to the applicant that his application for subsidiary protection was not being processed and determined.

19. By letter dated 15th February, 2013, the Department issued a s. 3 notice of a proposal to deport the applicant and enclosed a form for completion, notwithstanding the previous submission of applications for subsidiary protection and leave to remain by his solicitors and the subsequent correspondence. The applicant's solicitors wrote to the Department on 15th February requesting that the notice be withdrawn within seven days. This letter was acknowledged as received by letter dated 20th February. A further letter was sent by the applicant's solicitor on 22nd February, following which the Department replied, indicating its refusal to withdraw the notice.

20. The letter of 15th February stated that the reason for the deportation proposal was that:-

> "You entered the State and made a purported application for refugee status on 21st January 2009. You are a recognised refugee in the state of Hungary, and as such, are permitted to enter Ireland and stay for a maximum period of 90 days. That period expired on 21st April 2009. You have remained in the State since that date without the permission of the Minister for Justice, Equality and Law Reform.
>
> Accordingly, you are a person whose deportation would, in the opinion of the Minister, be conducive to the common good."

This letter is in the same terms as that which previously issued on 11th May, 2009. The letter then proceeded in the normal way to outline the options open to the applicant, which were essentially to leave the State before the Minister decided on a deportation order, consent to a deportation order or submit written representations to the Minister under s. 3 of the Immigration Act 1999. The subsidiary protection application was mentioned towards the end of the letter as follows:

> "Please note:

> By letter dated 12th February 2009, the Refugee Applications Commissioner notified you that your application for asylum was not being admitted for processing as you were already a recognised refugee in Hungary. As such, **you are not a person whose application for asylum has been refused by the Minister.** Therefore, you do not come within the terms of s. 3(2)(f), Immigration Act, 1999. The Minister is not obliged to consider an application for subsidiary protection made by you, nor does he have a discretion to do so. Therefore, **it is not legally possible to process any application for subsidiary protection made by you, or on your behalf**."

The letter concluded that the applicant could be assured that all submissions and representations made by him or on his behalf already on file would be considered by the Minister when deciding the case in accordance with the provisions of s. 3 of the Immigration Act 1999.

21. This was the first indication that the subsidiary protection application would not be considered since it was lodged on 9th December, 2011. It is regrettable that this letter did not address in a forthright manner, the clear problem presented for both sides at that time, namely, that the Minister did not consider that he could lawfully have entered into the terms of settlement and that he was resiling from same. The Department refused to withdraw the notice of the proposal to deport the applicant requested on 15th February. A reply was sent setting out the terms of settlement of 20th March, 2012, and in light of that agreement, requesting that the notice be withdrawn.

22. By letter dated 22nd February, 2013, it was accepted by the Minister that the previous proceedings had been settled and struck out on foot of the letter from the Chief State Solicitor's Office dated 20th March, 2012. Having set out the paragraph already quoted above, the letter stated:

> "Your client is a person who arrived in the State in January 2009 and applied for asylum. His application was rejected at first instance by the Office of the Refugee Applications Commissioner on the basis that he had been granted asylum in Hungary. The Refugee Applications Commissioner determined that your client is excluded from the asylum process by virtue of s. 17(4) Refugee Act 1996 (as amended). Your client was so informed by letter dated 12th February 2009. Accordingly, it is clear that your client is not a failed asylum seeker and is therefore not a person referred to in s. 3(2)(f) Immigration Act 1999.
>
> It is clear that your client is not a person in respect of whom the Minister is obliged to consider an application for Subsidiary Protection under Regulation 4, European Communities (Eligibility for Protection) Regulations 2006. The Minister is satisfied that, having regard to the decision of the Supreme Court in *Izevbekhiai v. Minister* [2010] IESC 44, and *H.N. v. Minister* [2012] IESC 58, that the Minister does not have a discretion to consider an application for Subsidiary Protection in cases not provided for.
>
> As such, notwithstanding the reference to an application for Subsidiary Protection contained in the letter of 20th March 2012, it is clear that the Minister is not in a position to consider any such application. I am directed by the Minister for Justice and Equality to apologise for any misunderstanding which arose as a result of the letter of 20th March 2012."

The Challenge [2013 No. 152 J.R.]

23. The applicant was granted leave to apply for judicial review, seeking an order of *certiorari* quashing the decision of the Minister, evidenced by the letter dated 22nd February 2013, refusing to process the determine the applicant's application for subsidiary protection, and an order of *mandamus* requiring the respondent to process it forthwith in accordance with law.

24. Leave was granted on a number of grounds which may be shortly stated as follows:

> (a) The decision of the Minister to refuse to determine the application was in breach of his obligations under the European Communities (Eligibility for Protection) Regulations 2006, including Regulation 4(2) thereof and/or Directive 2004/83/EC.
>
> (b) The refusal to determine the application was an unlawful breach of the respondent's binding agreement with the applicant to process and determine the subsidiary protection application and/or was in violation of his right to fair procedures under Article 40.3 of the Constitution and Article 6 of the European Convention on Human Rights.
>
> (c) The applicant was also granted leave to seek damages but that element of the application was adjourned until the conclusion of the substantive proceedings.

The Challenge [2013 No. 153 J.R.]

25. A further application for leave to apply for judicial review, also made on 4th March 2013, is before the court. In this application the applicant seeks an order of *certiorari* quashing the notice dated 15th February, 2013, issued against the applicant pursuant to s. 3(3) of the Immigration Act 1999 (as amended), informing him that the Minister was proposing to deport him. This application was made on the same grounds and proceeds in tandem with judicial review proceedings record No. [2013 No. 152 J.R.]. The previous deportation order made on 8th November, 2011, was revoked in accordance with the terms of settlement. On the state's case, therefore, the applicant is still entitled to make submissions as to why he should be granted leave to remain under s. 3 of the Immigration Act 1999. The applicant contends that the notice of 15th February should never have issued pending the determination of the subsidiary protection application.

The Enforcement of the Settlement and Legitimate Expectation

26. It is clear that both parties settled the previous judicial review proceedings (2011 No. 118 J.R.) on the basis that the Minister would consider an application for subsidiary protection and humanitarian leave to remain pursuant to s. 3 of the Immigration Act 1999. The court is satisfied on the evidence that both parties concluded the settlement terms on the understanding that the Minister could lawfully receive and consider an application for subsidiary protection, because the applicant was a failed asylum seeker. This informed the processing of the application for subsidiary protection, as evidenced by the course of correspondence already set out. The application for subsidiary protection was made on 9th December, 2011, but it was not until the letter of 22nd February, 2013, that the Minister informed the applicant that the agreement was not legally binding because he had not, in fact, been refused a declaration of refugee status by the Minister. This was explained in the affidavit of Mr. Denis Byrne of 25th October, 2013, as follows:-

> "7. I say that the…term, concerning the applicant's subsidiary protection application, was agreed in error having regard to European and domestic legislative provisions in respect of the respondent's power to consider applications for subsidiary protection. I say that the term was agreed in error in particular where the applicant was a declared refugee in another member state and where his application for asylum in the state, made in 2009, had not been refused but was not processed by the Office of the Refugee Applications Commissioner in the circumstances. The applicant was not therefore a person whose application for refugee status had been "refused" for the purpose of the relevant legislation governing eligibility to apply for subsidiary protection, and the Minister's consideration of such applications, including in particular the provisions of Article 2 of Council Directive 2004/83/EC, Regulation 4 of the European Communities (Eligibility for Protection) Regulations 2006 and the provisions of the Immigration Act 1999 at section 3.
>
> 8. Following the initial identification of this error, which occurred several months after the settlement agreement had been reached in late March, 2012, and the 2011 proceedings struck out, the respondent required further legal advice in order to address the matter from the Office of the Chief State Solicitor and counsel who acted in the 2011 proceedings. Upon receipt of that advice and final consideration of the matter, it was clear that the respondent was not in a position to consider the applicant's subsidiary protection application given his circumstances.
>
> 9. Following the receipt of legal advice in respect of the aforementioned term of settlement agreed between the parties in March, 2012 regarding the applicant's subsidiary protection and application and final consideration of the matter, the respondent issued a letter dated 11th February, 2013, to the applicant providing a copy to his solicitor's with fresh "notice" of the respondent's proposal to deport him. This letter, dated just over two weeks prior to the commencement of these proceedings, issued for the purpose of implementing the second limb of the settlement agreement. It explained that where the applicant was a recognised refugee in Hungary, he was permitted to enter Ireland and to stay for a period of 90 days, but that the period had expired on 21st April, 2009. The letter informed the applicant of various options open to him…It noted that the Refugee Applications Commissioner had determined by letter dated 12th February, 2009, that the applicant's asylum application was not being admitted for processing as he was already a recognised refugee in Hungary and emphasising the applicant was not a person whose application for asylum had been refused by the Minister. The letter stated that as a consequence the Minister was not obliged to consider an application for subsidiary protection made by him, and further, that it was not legally possible to process any such application…"

27. The Minister accepts that the applicant completed an application for asylum pursuant to s. 8 of the Refugee Act 1996, provided details of his circumstances in a preliminary "ASY1" interview, and also completed a questionnaire at the time of his application. However, his claim was not processed by ORAC because he was found to have applied for and been granted asylum under a different name in Hungary in 2006 following a "EURODAC" fingerprint search. As a result, the applicant was informed by the Commissioner on 12th February, 2009, that since he had not claimed a fear of persecution in Hungary and the Minister was precluded from giving a declaration that he was a refugee under s. 17(4) of the Refugee Act (as amended), no purpose would be served by investigating his claim and that his application was not "being admitted for processing". The Minister submits that the asylum claim was never "refused" and consequently, he could not be regarded as a person within the category referred to in s. 3(2)(f) of the Immigration Act 1999.

28. It is submitted on behalf of the applicant that he entered the terms of settlement on the basis that he was a failed asylum seeker and that this is evidenced by the letter furnished on 23rd September, 2009, by the Irish Naturalisation and Immigration Service, already quoted. The letter states that consideration was being given to an application for leave to remain under s. 3 of the Immigration Act 1999. In the letter dated 15th November, 2011, under cover of which the deportation order made on 8th November was served, it was stated by the INIS that:-

> "The reasons for the Minister's decision are that you are a person whose application for declaration as a refugee has been refused."

As already noted, this was at variance with the recital in the deportation order that the applicant "is a person in respect of whom a deportation order may be made under subsection (2)(i) of the said section 3", which allows the Minister to deport a non-national in the interests of the common good.

29. The applicant's solicitor, Ms. Karen Berkeley, who was first instructed by him on 24th November, 2011, outlines in her affidavit of 19th November, 2013, that she, her client, and counsel always approached the applicant's case on the basis that he had been refused a declaration of refugee status by the Minister in 2009. They based this approach upon the contents of the letter of 15th November, 2011, the earlier letter of 23rd September, 2009, and the terms of settlement. It was considered that the Minister was the only person who could refuse an application for a declaration of refugee status. They also believed that they could not, because of the passage of time, seek to challenge the manner in which the application was processed by the Office of the Refugee Applications Commissioner in 2009. She expressed astonishment that the Minister, through Mr. Byrne, now stated that he had never refused the applicant's application for a declaration of refugee status.

30. Article 2(e) of Council Directive 2004/83/EC of 29th April, 2004, (the Qualifications Directive) defines the category of persons who are eligible for subsidiary protection as third country nationals or stateless persons who do not qualify as refugees but in respect of whom substantial grounds have been shown for believing that if returned to their country of origin, or in the case of a stateless person to their country of formal habitual residence, they face a real risk of suffering serious harm. A person entitled to refugee status is defined under Article 2(d) as a third country national or stateless person who has been recognised by a member state as a refugee.

31. This definition of persons eligible for subsidiary protection is replicated in the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006), which gave effect to the Qualification Directive in Ireland. Regulation 4 sets out the statutory procedure governing subsidiary protection and provides:-

> "(1)(a) A notification of a proposal under section 3(3) of the Act of 1999 (to consider deportation) shall include a statement that, where a person to whom section 3(2)(f) of that Act applies considers that he or she is a person eligible for subsidiary protection, he or she may, in addition to making representations under section 3(3)(b) of that Act (for humanitarian leave to remain) make an application for subsidiary protection to the Minister within the 15 day period referred to in the notification."

32. Section 3(2) of the Immigration Act 1999, provides (inter alia):-

> "An order under subsection (1) (a deportation order) may be made in respect of –

(f) a person whose application for asylum has been refused by the Minister,

…

(i) a person whose deportation would, in the opinion of the Minister, be conducive to the common good."

33. Regulation 4(2) of the 2006 Regulations provides that:-

> "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)."

34. In *Izevbekhai v. Minister for Justice, Equality and Law Reform* [2010] IESC 303, the Supreme Court held that the Minister was not obliged to consider an application for subsidiary protection from any person other than one to whom Regulation 4(1) and (2) applies. There was no discretion vested in the Minister, either expressly or implicitly, under the Regulations to consider applications for subsidiary protection in cases which were not covered, i.e. in respect of persons who were not failed asylum seekers under s. 3(2)(f).

35. The court is satisfied on the evidence adduced and having considered the prior history of the case, including the previous judicial review proceedings and the affidavits and exhibits contained therein, that the Minister did not refuse to grant the applicant a declaration of refugee status under s. 17(1)(b) of the Refugee Act 1996 (as amended). The court is also satisfied that the two letters upon which reliance is placed by the applicant as indicative of the granting of refugee status issued in error. It is clear from the recitals in the deportation order that the applicant was considered to be "a person whose deportation would, in the opinion of the Minister, be conducive to the common good". This opinion had also been indicated in the letter of 11th May, 2009. The applicant had been informed in clear terms in the letter of 12th February, 2009, by ORAC that his application was "not being admitted for processing". It stated that since he had not claimed a fear of persecution in Hungary, in accordance with s. 17(4) of the Act, the Minister was precluded from granting a declaration that he was a refugee because he had been granted asylum in Hungary. This was also made clear in the examination of file dated 1st July, 2011, in which the nature of the applicant's connection with the state was considered under s. 3(6)(d) as being that "he resides illegally in the state having been granted refugee status in a fellow EU member state". In a handwritten amendment to the examination of file, the Assistant Principal Officer, Mr. Ryan, recommended that the deportation be to Hungary where the applicant had refugee status.

36. The court also notes that in Exhibit "CA1" of the applicant's affidavit in the previous judicial review proceedings dated 14th October, 2011, his then solicitors wrote to him on 29th September, 2009, following a consultation and stated:-

> "I will need to clarify whether (and) what type of status you were granted in Hungary in order to advise you whether you are eligible to apply in Ireland for subsidiary protection. Subsidiary protection is only available to those applicants who have been refused a declaration as a refugee. As you appear not to have been admitted to the asylum process in Ireland at all, it might be the case that you are not eligible to apply for subsidiary protection which would leave an application for humanitarian leave to remain (under) s. 3 of the Immigration Act 1999 (as amended), the only option open to you."

37. The court is satisfied that, at all material times the applicant was informed that his application had not been processed because he had refugee status in Hungary and was not asserting a fear of persecution there, as a result of which he could not have been granted refugee status in Ireland under section 17(4) of the Act. Two consequences flow from this. As the applicant had not been refused refugee status he could not be regarded as a person who was eligible for consideration for subsidiary protection under Regulation 4(2). Secondly, since the Minister was precluded from granting subsidiary protection to the applicant under Regulation 4, neither he or his representatives could lawfully enter an agreement to do so. Therefore, the terms of settlement, insofar as they provided that upon the striking out of the proceedings the applicant would be entitled to make an application for subsidiary protection which the Minister might consider or grant, could not have resulted in a grant of subsidiary protection to the applicant who was not entitled to be considered for same. The Minister in entering into Term 3 of the Terms of Settlement in respect of subsidiary protection, acted *ultra vires* the Regulations and under a mistake of law.

38. It is submitted on behalf of the applicant that at all material times he and his advisers acted on the basis that he was a failed asylum seeker and, therefore, entitled to apply for subsidiary protection. The court is satisfied that, if this were so, the applicant was operating under a mistake of fact and law. However, the court is also satisfied that the applicant and his earlier advisers were clearly aware and understood that the applicant had not been admitted to the asylum process, and that he was not refused refugee status. Notwithstanding this, the applicant and his later legal advisers were satisfied to conclude the agreement settling the previous judicial review proceedings even though, on the documents quoted earlier, there was a substantial doubt over whether he was in fact a failed asylum seeker for the purpose of section 3(2)(f).

39. As a matter of public policy and good and orderly administration (including the orderly administration of justice), in the normal case, public authorities should be bound by terms of settlement agreed in the course of litigation in the absence of good reasons to the contrary. The court is satisfied that in this case, the Minister could not arrogate to herself a power or discretion which had not been conferred by the Directive or the Regulations so as to permit the consideration of the applicant's claim for subsidiary protection when he had not been refused refugee status under Section 3(2)(f). Furthermore, the donee of a statutory power may not extend its power by creating an estoppel or by entering an agreement under which it purports to assume or exercise a power not specifically conferred upon it (*In Re Greendale Building Company* [1977] I.R. 256; *Dublin Corporation v. McGrath* [1978] ILRM 208). The court is satisfied that if the Minister considered the applicant's application for subsidiary protection, she would be acting *ultra vires* Regulation 4. The implementation by the Minister of the agreed term would take her beyond the legal parameters of the powers and duties conferred in respect of subsidiary protection and would be unlawful (*Fakih v. Minister for Justice* [1993] 2 I.R. 406 and *Attorney General for Hong Kong v. Ns Yeu & Shiu* [1983] A.C. 629). Insofar as the term of settlement was beyond the competence and power of the respondent, it was void *ab initio* (Foskett "*The Law and Practice of Compromise*" (7th Ed.) para. 4-10 and the authorities cited therein, and *Credit Suisse v. Allendale Borough Council* [1997] Q.B. 306). The applicant has failed to establish that he has a legal right to the performance of the term of settlement or that there is any legal duty on the Minister to consider subsidiary protection in his case. Therefore, there is no basis upon which to grant an order of *mandamus*, or to quash the decision refusing to process the application. (*The State (Modern Homes Ireland) Ltd v. Dublin Corporation* [1953] I.R. 202 at pp. 227-229).

The Second Challenge [2013 No. 153 J.R.]

40. In these proceedings the applicant seeks to quash the proposal for his deportation contained in the letter of 15th February, 2013. The parties have agreed that the court may treat this leave to apply for judicial review as the hearing of the substantive matter in a "telescoped" procedure, if substantial grounds are found to exist upon which to grant leave.

41. The applicant submits that the fresh proposal to deport him is unlawful because the respondent undertook to process and determine the application for leave to remain in the state, which had been submitted on 9th December, 2011, under the terms of settlement. The applicant also complains that the Minister was guilty of undue delay in the manner in which he had dealt with this application.

42. The respondent contends that having examined the legal difficulties concerning the consideration of the application for subsidiary protection and concluded that it could not lawfully proceed, the second limb of the agreement in respect of the s. 3 application for leave to remain had to be addressed. In accordance with the terms of the agreement the deportation order had been withdrawn on 4th April, 2012. A s. 3 application had been made on 9th December, 2011, which, had the subsidiary protection application been open to the applicant, fell to be considered if that application had been refused. That entire process evolved from the initial notice of proposal to consider deportation which had issued on 11th May, 2009. If the applicant is correct and the Minister ought now to consider the application for leave to remain on foot of the application made on 9th December, 2009, the court is not satisfied that the applicant has suffered any prejudice by the issuing of the letter of 15th February, 2013, containing a further notice of proposal to consider the deportation of the applicant, a matter in respect of which the applicant had already made significant submissions. It was indicated in that letter that all previous submissions made would be considered in relation to the s. 3 application. The letter explained the circumstances in which the second notice was issued, which arose directly from the inability of the respondent to consider the application for subsidiary protection. The court is satisfied that it was entirely fair to give notice to the applicant that it was now intended to proceed to consider the proposal to deport him, reiterate the ground, and give the applicant a further opportunity to consider his position. His position had not changed since the initial proposal to deport him as set out in the letter of 11th May, 2009, insofar as the first and second proposals properly confine the options open to the applicant as those relating to a person whose deportation is thought to be in the common good, rather than as a failed asylum seeker.

43. The essential feature of the second letter is that having given further notice to the applicant of the proposal to deport him, it explains the circumstances in which this proposal now issued in the light of the difficulties surrounding the consideration of his application for subsidiary protection, notwithstanding the terms of settlement. It clearly indicated that all previous submissions made in relation to the application for leave to remain made 9th December, 2011, would be considered fully and invited such further representations as the applicant wished to make. Even if the applicant was technically correct in the submission that the first application for leave to remain remains undetermined, the second proposal letter of 15th February, 2013, may be regarded as mere surplusage.

44. The delay in processing the initial application for leave to remain and/or the further consideration of deportation following the issuing of the letter of 22nd February must be viewed in the context of the facts. Following the making of the initial application, a deportation order was made on 8th November, 2011, which was withdrawn under the terms of settlement on 4th April, 2012. The delay in recognising and resolving the difficulty in considering the application for subsidiary protection, notwithstanding the agreement to do so, is explained in the affidavit of Mr. Byrne. Following the realisation of the error made, legal advice had to be obtained as a result of which, the letter issued on 15th February, 2013. This is a case which was characterised by a number of mutual errors, not least in the formulation of the terms of settlement, which the court cannot ignore. The correspondence between the parties during 2012 indicates the continuing nature of the error to which, I am satisfied, both parties contributed. I am also satisfied that the issuing of the letter of intention to deport the applicant on 15th February, 2013, was an attempt to clarify the applicant's status and provide a further opportunity to make representations to the respondent in support of the application for leave to remain in the state. It would have been entirely unfair to the applicant if the Minister without making any reference to the changed view in respect of the legal authority to consider subsidiary protection, simply proceeded to make a deportation order against the applicant on the basis of submissions already made. Quite properly, the Minister did not take that unilateral step and gave notice to the applicant of the intention to focus on the proposal to deport him because of the legal constraint that applied to the consideration of subsidiary protection. In the circumstances, I am not satisfied that there are any substantial grounds upon which to consider a grant of leave to apply for judicial review in respect of the letter of 15th February. Having considered all of the evidence in the case, I am further satisfied that even if the grounds advanced were viewed as substantial, the applicant could not have established on a full hearing of the action that the decision to issue the letter was fundamentally flawed on the grounds advanced.

Application to Amend Grounds

45. An application to amend the grounds upon which the applicant relied in both sets of proceedings was brought by notices of motion dated 19th November 2013, following the delivery of the affidavit of Denis Byrne sworn on 25th October, and filed on 8th November 2013, in which it was claimed at para. 28 that the letters from the Department of Justice and Equality, which stated that the Minister had refused the applicant's application for refugee status, were in fact "erroneous". It was also stated in the affidavit that at no point did the Minister refuse the applicant's application for a declaration of refugee status. In those circumstances the applicant sought an alternative declaration in each case that:-

> "2A. Because the respondent has not refused the applicant's application for a declaration of refugee status, that application remains outstanding and the applicant continues to reside lawfully in the state, pursuant to s. 9 of the Refugee Act 1996, and the applicant must now be processed and determined expeditiously in accordance with the provisions of the said Act."

46. This relief was sought on the ground that:-

> "Section 9(2) of the Refugee Act 1996, defines the manner in which an applicant's application for a declaration of refugee status may be terminated. The applicant was always of the view that s. 9(2)(c) had been applied to his case, i.e. that the respondent had refused to grant him a declaration of refugee status. However, in the respondent's statement of opposition, and grounding affidavit, the respondent states that he did not refuse the applicant's application for refugee status, and that previous statements that he did were "erroneous". That being the case, the applicant's application for refugee status remains outstanding and the applicant continues to reside lawfully in the state pursuant to s. 9(2) of the Refugee Act 1996. Given the inordinate delay, the applicant's application for a declaration of refugee status must now be processed and determined expeditiously."

The applicant submits that this amendment should be granted on the basis that he at all material times understood from the letter giving him notice of the deportation order dated 15th November, 2011, and the earlier letter of 23rd September, 2009, to which reference has already made, that he was a person who had been refused refugee status under s. 3(2)(f) of the Refugee Act 1996, as amended. It was claimed that this understanding was reinforced by the terms of settlement reached whereby it was agreed that the applicant could make an application for subsidiary protection. It is clear that this subsidiary protection was only open to the applicant if, he were, in fact, a failed asylum seeker. Subsequently, however, the Minister indicated that the applicant was not a failed asylum seeker and, therefore, was not entitled to apply for subsidiary protection. In addition, the Minister maintained in correspondence that the two letters containing a reference to the applicant as a failed asylum seeker were issued in error, and that the terms of

settlement were also agreed on the basis of a mistake as to the applicant's status. If that is so, the applicant submits that the original application for asylum under s. 8 of the Refugee Act 1996, remains extant and has not yet been determined. Thus, the applicant seeks leave to apply for judicial review for the declaration set out at para. 2A in the amended statement of grounds on the ground quoted above. It is submitted that the amendment should be granted because it is in the interests of justice that this issue, which, it is claimed, only crystallised on the receipt of the affidavit of Mr. Byrne, and the statement of opposition, ought to be determined by the court. It is claimed that this was not something which could have been addressed previously by the applicant at the time of the initial application because he and his advisers, at all material times, proceeded on the basis that he was a "failed asylum seeker" under section 3(2)(f).

47. It is well established that when leave to apply for judicial review has been granted the applicant has limited scope for arguing that he/she should be permitted to amend the grounds upon which leave has been granted. However, an amendment may be granted when this is required in the interests of justice. A number of matters may be considered, including whether granting the amendment would result in any significant enlargement of the applicant's case. Though the discovery of new facts or proof of such discovery may be relevant to the granting of an amendment, it is not a pre-condition. The newly argued ground may emerge in the respondent's answer to the application, whether by way of evidence or in a statement of opposition. If the amendment amounts to a claim for entirely new relief, it may be refused. A delay in seeking leave to amend the grounds may also be relevant. However, if the application for leave to amend is made within the time prescribed for the making of the application for leave to apply, the issue of time is of less significance. The applicable principles were summarised by Fennelly J. in *Keegan v. An Garda Síochána Ombudsman Commission* [2012] IESC 29 as follows:-

> "33. Once an applicant has obtained an order granting leave to apply for judicial review he is confined to the grounds permitted. He may not argue any additional grounds without leave of the court.
>
> 34. If he applies for an amendment on his grounds within the judicial review time limit, he should, obviously, at least in normal circumstances, have no difficulty obtaining the amendment. If he applies for an amendment outside the time, he will have to justify the application. He will have to explain his delay, just as in the case of a late applicant. The court will expect him to give reasons to explain his failure to include the new proposed ground in his original application.
>
> 35. On the other hand, it is difficult to see why an applicant for an amendment of grounds should have to satisfy a more exacting standard in explaining delay than is imposed on an ordinary late application. He may say that the additional ground is based on material of which he was unaware when he was making his original application. On occasion the respondent reveals a new ground of argument in its answer to the application…the applicant may offer a different a explanation. There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition. This is not to say that the applicant's knowledge of the facts is irrelevant…in some cases…discovery of new facts may be an explanation for the omission to include a ground. In other cases, the applicant may have been aware at all relevant times of the facts relevant to the new ground and this will weigh in the balance against him, without being necessarily conclusive.
>
> 36. None of this is to take away from the fact that an applicant for an amendment of his grounds for judicial review must explain his failure to include the proposed new ground in his original application. The cases show that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action…or a challenge to a different decision…the nature of the decision under attack may also be relevant. If it is one which benefits the public at large or a large section of the public, a challenge may have corresponding disadvantages for a large number of people. This may explain why special and stricter statutory rules have been introduced in cases of public procurement, planning and development and asylum and immigration. The courts will have regard to the public policy considerations which have prompted the adoption of such rules.
>
> 37. Amendment may be more likely to be permitted where…it does not involve a significant enlargement of the applicant's case. To the extent that leave has already been granted, the public interest in the certainty of a decision is already under question. An additional ground may not make any significant difference, particularly if it is based…on a pure matter of law. A court might take a different view, if the new ground were likely to give rise to further exchange of affidavits relating to the facts."

48. The new issue which the applicant now raises is that he was never refused a recommendation of refugee status by ORAC and consequently, was never refused refugee status by the Minister under s. 17 of the Refugee Act, as amended. It is now contended that since the applicant's claim for refugee status under s. 8 of the Act has never been determined, he has at all material times since his original application in 2009, been lawfully in the state and is not a person who may be considered for deportation by reason of the state's obligation to give him permission as an asylum seeker to remain in the state pending the determination of his application under s. 9(3). It is submitted that ORAC had no power under the provisions of the Refugee Act 1996 (as amended), to decline to process the applicant's claim for a declaration of refugee status under the Act, once it had been submitted under section 8. Though it is clear that the applicant was granted refugee status in Hungary, that he had not made a claim of persecution in respect of Hungary, and that s. 17(4) of the Act provides that in those circumstances the Minister "shall not" give a declaration to a refugee who has been recognised as a refugee under the Geneva Convention by a contracting state, the applicant submits that the full procedure under the Refugee Act must be applied once the application has been made. In essence, it is argued that the full statutory application process should be applied consisting of a recommendation by ORAC, the option of an appeal to the Refugee Appeals Tribunal if there is an adverse recommendation, resulting in an appropriate consideration by the Minister under s. 17 at the end of that process. Though the relief claimed is in the form of a declaration, it is, in effect, a collateral attack upon the decision by ORAC as evidenced by letter dated 12th February, 2009, declining to admit the application for processing.

49. This application to amend was extremely late and well outside the time limit applicable to leave to apply for judicial review of the 2009 decision under s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. An extension of time may be granted if there is good and sufficient reason for doing so. The applicant contends that this issue only crystallised on the receipt of the statement of opposition and the grounding affidavit of Mr. Byrne, and the contention made by the Minister that the applicant was not a failed asylum seeker for the purpose of s. 3(2)(f). The applicant claims that time should run from 15th February, 2013, on the basis that the application to amend, though made nine months after the letter of that date, was only some 11 days after the affidavit sworn by Mr. Byrne was received. The applicant's solicitor states that since the case was approached on the basis that refugee status had been refused by the Minister in 2009, the passage of time did not allow for a challenge to the decision at that time. The court is not satisfied that the issue raised in the proposed amendment was not an issue that could have been raised in 2009. If the declaration now sought had any merit, it was equally open to challenge the decision on the same ground in 2009, in that it could have been argued at that stage that the decision was ultra vires on the same ground as now proposed. The court does not accept that the matter first came to the

attention of the applicant or his legal advisers on the basis of the affidavit of Mr. Byrne and the statement of opposition. Clearly the matter was contemplated by the applicant's former solicitors and the basis of the decision made in 2009 was set out clearly in the correspondence to the applicant at that time. As already noted, the proposed deportation in 2011 was not on the basis that he was a failed asylum seeker, nor was the order ultimately made on that basis. There was no challenge in the 2011 proceedings to the 2009 decision. The ground was not advanced in the initial application brought in these proceedings, notwithstanding the fact that a second set of proceedings was contemplated and drafted (2013 No. 153 J.R.) which sought to challenge the second proposal to deport. The court is, therefore, not satisfied that good and sufficient reason has been demonstrated upon which to grant an extension of time in this case.

50. The court is not satisfied that the circumstances outlined in the affidavit of Mr. Byrne or the statement of opposition offer evidence of newly discovered facts sufficient to warrant an extension of time, or the granting of an amendment in either set of proceedings. I am not satisfied that the applicant has adequately explained his failure to seek judicial review of the original decision in 2009, and I do not accept that the applicant was not or should not reasonably have been aware of the nature and extent of the decision in 2009 for the reasons already stated. Furthermore, the declaration and the ground upon which it is based constitute a claim which is separate and distinct from the original challenges made to the decision not to proceed with the consideration of subsidiary protection, and the further decision to issue the second letter proposing the applicant's deportation. The proposed amendment is a significant enlargement of the applicant's case and a challenge to a different decision to those the subject of these proceedings. It was introduced at a very late stage in respect of a decision to which the legislature has applied a strict time limit as a matter of public policy in respect of asylum claims. I also consider it unfair to require the respondent to defend a challenge to a decision concerning an application for asylum which was dishonest in significant respects. Furthermore, the court is not satisfied that the proposed ground gives rise to a substantial ground upon which to grant leave.

51. In *S.Y & Anor v. Refugee Appeals Tribunal* [2009] IEHC 18, the applicant completed appropriate application forms seeking asylum following her arrival in Ireland from Italy where she had been granted asylum. She had left Italy to come to Ireland because she could no longer live there because economic and social conditions were very difficult for her. The applicant received a letter in exactly the same terms as that received by the applicant in this case in 2009. A complaint was made that ORAC could not refuse to conduct an investigation mandated by the Refugee Act 1996, in a pre-emptive way by concluding that such an investigation would be futile because she had come from Italy where she had been granted asylum, and the Minister had no statutory power to grant a declaration of refugee status under section 17(4). The applicant had no fear of persecution if returned to Italy. McMahon J. stated:-

> "It is quite clear from the affidavits and from the evidence before the court that the applicant has not made out the case that she has any fear of persecution if she is returned to Italy. On the contrary she has clearly stated in the documentation that she has left Italy largely for economic reasons and because she has no suitable accommodation. Moreover, notwithstanding the very clear indication from the Commissioner by letter on 14th June, 2007, which pointed out to the applicant that there was no claim of a risk of persecution in Italy, she has not since put forward any factual basis which would make s. 17(4) of the Act inapplicable in her case. This is an important point to bear in mind since such a finding removes any room for factual dispute in relation to the "fear of persecution" issue. If a "fear of persecution" was in issue then the applicant's case would be much stronger. Absent this, however, the issue in s. 17(4) is a purely legal one, bearing in mind again that it is common case that the applicant has been recognised as a refugee in Italy.
>
> For this reason alone, and since the section is in no way ambiguous on the issue, the first named respondent is correct when he says to conduct an interview in those circumstances would be a futile exercise. It is important to note that s. 17(4) does not give the Minister a discretion in the matter and the Commissioner's decision is not one which usurps a Ministerial discretion. If s. 17(4) gave the Minister a discretion then of course the Commissioner could not pre-empt the Minister's decision. This, however, is not the case here as can be clearly seen from the wording of the subsection."

52. This decision was cited and relied upon by Hogan J. in *A.Q.S & K.I.S* [2010] IEHC 421 and this Court in *J.G. & W.M. (Czech Republic) v. Refugee Appeals Commissioner & and the Minister for Justice, Equality and Law Reform* [2013] IEHC 248. It is only in the clearest cases when the applicant has not demonstrated a reasonable possibility of "fear of persecution" on the facts adduced that the applicant should be excluded from the process having regard to the provisions of s. 17(4) of the Act. Having regard to the decision in *World Port Ireland Limited (in Liquidation) and the Companies Act* [2005] IEHC 189, I am satisfied that the principles applied in these cases to the interpretation of s. 17(4) and the decision not to process the applications in those case, apply equally to this case. Consequently, the ground advanced is not a "substantial ground" upon which to grant leave to apply for judicial review in this case, a factor which I take into account in declining to extend the time and to grant an amendment of the pleadings in these proceedings.

53. Therefore, the court is not satisfied that it is in the interests of justice in the circumstances of this case to grant the amendment sought in respect of each set of proceedings for the reasons set out above.

Conclusion

54. For all of the above reasons, this application is refused.