Neutral Citation: [2014] IEHC 606

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 725 JR]

BETWEEN/

A.E.A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 4th day of December, 2014

1. This is a post-leave application by way of judicial review for an order of *certiorari* quashing the decision of the Minister to refuse to process and determine the applicant's application for subsidiary protection, and for an order of *mandamus* compelling the Minister to process and determine the applicant's application for subsidiary protection pursuant to the provisions of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) ("the Protection Regulations"), which transposed Council Directive 2004/83/EC of 29th April, 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive").

Background

2. The applicant in this case is a Somali national born on 10th July, 1970. She arrived in Ireland and applied for asylum on 7th July, 2005. The Office of the Refugee Applications Commissioner recommended that her claim be refused, and this recommendation was affirmed by the Refugee Appeals Tribunal in its decision dated 14th March, 2006. On 7th April, 2006, the Minister refused to grant the applicant a declaration of refugee status and by the same letter notified the applicant of his proposal to deport her. This was before the entry into force of the Protection Regulations on 10th October, 2006.

3. The applicant sought to have the RAT's decision quashed by way of judicial review but this application was unsuccessful and was dismissed by order dated 25th July, 2008. On 28th September, 2006, the Refugee Legal Service submitted representations to the Minister on the applicant's behalf pursuant to s. 3(3)(b) of the Immigration Act 1999, as amended, requesting leave to remain in the State. This application was supplemented by further submissions on 7th November, 2008, after the judicial review application had failed.

4. By decision dated 5th May, 2009, the Minister decided to grant the applicant leave to remain for a year. This permission has been renewed on subsequent occasions. The respondent did not provide reasons for his decision to grant the applicant leave to remain, or for the subsequent renewals.

5. By letter dated 10th July, 2013, the applicant submitted a subsidiary protection application to the Minister. She stated that she has five children who remain in Ethiopia with their grandmother and stated that she wished to be reunited with them.

6. The Minister rejected the applicant's application on the grounds that Recital 9 of the Qualification Directive precluded persons who had a right of residency in a Member State from making an application for subsidiary protection. The Minister quoted Recital 9, which states:-

> *Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.*

7. The applicant instituted these proceedings challenging the Minister's decision, and was granted leave to apply for judicial review by order of McDermott J. on 14th October, 2013.

The present proceedings

8. The Minister does not now stand over the reason given for not accepting the applicant's subsidiary protection application submitted on 10th July, 2013. Instead, the Minister now adopts the position that, in accordance with the interpretation of the Protection Regulations by the Supreme Court in *Izevbekhai v. Minister for Justice, Equality and Law Reform* [2010] IESC 44, she had no discretion to accept an application for subsidiary protection from the applicant since the applicant had no right to apply for subsidiary protection under the terms of the Regulations.

9. The applicant has submitted that the Minister is not, as a matter of law, permitted to seek to change his reasons for a decision once the decision has been the subject of an application for judicial review. The applicant cites, *inter alia*, *Mullholland v. AnBordPleanala (No. 2)* [2006] 1 IR 453; *EMI Records (Ireland) Limited v. The Data Protection Commissioner* [2013] IESC 1; and *R. v. City of Westminster* [1996] 28 HLR 819, in support of this argument. Applying these authorities, the applicant contends that the Minister's advancement of new reasons in the present proceedings, and the abandonment of the sole original reason given, is such as to entitle the applicant to *certiorari*.

10. The respondent argues that the applicant's contention that the Minister has substituted new reasons for her refusal in place of the reason originally stated is misconceived. The respondent submits that what has in fact occurred is that the Minister has now recognised that, in accordance with the terms of the Protection Regulations as interpreted in the Supreme Court's decision in *Izevbekhai*, she did not have the power to accept the applicant's subsidiary protection application dated 10th July, 2013. Accordingly,

the respondent argues that the precise reasons given by the Minister for not entertaining the application are ultimately not material to the question as to whether or not she was empowered to accept it.

11. The respondent pointed out that if the court accepts the Minister's position that she did not have discretion to accept the application, the court would be acting in vain if it made an order quashing the decision of 12thJuly, 2013. The respondent states that the inevitable outcome would be that the Minister would refuse to accept the application again on the basis that the application had not been made in accordance with the Protection Regulations and that she did not have discretion to accept it. The respondent submits that in Izevbekhai, the Supreme Court, having found that there was no discretion on the Minister's part to examine the applicant's subsidiary protection application, dismissed the applicant's appeal without considering the merits of the Minister's decision.

12. As a preliminary matter, therefore, the court must assess whether the Minister has the power to accept and determine a subsidiary protection application from the present applicant in light of her particular circumstances.

Does the Minister have the power to consider the applicant's application for subsidiary protection?
13. The respondent argues that the Minister does not have the power to consider an application for subsidiary protection from an applicant whose asylum application was rejected prior to the coming into force of the Protection Regulations. This, the respondent submits, is in accordance with the terms of the Protection Regulations and the judgment of the Supreme Court in *Izevbekhai*. It is therefore necessary to give careful consideration to the Regulations and to the *Izevbekhai* decision.

The European Communities (Eligibility for Protection) Regulations 2006
14. The Protection Regulations were made on 9th October 2006 for the purpose of giving effect to Council Directive 2004/83/EC of 29th April, 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. They came into operation on 10th October 2006 (see Regulation 1 (2)).

15. Article 2(e) defines the "persons falling within the scope of this Directive," insofar as it concerns subsidiary protection (see Recital 11) in the following terms:

> *" '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.."*

16. Fennelly J. notes in *Izevbekhai* that the Directive is expressed in general terms. The learned judge stated:

> *It does not refer to or attach its obligations to any particular administrative or legal acts or decisions of the Member States. The mandatory obligation expressed in Article 18 is to grant subsidiary protection to a person eligible for it. In effect, to be eligible, a person who does not qualify for the status of a refugee must be able to "show substantial grounds for believing that" he or she would "would face a real risk of suffering serious harm," as defined by Article 15, if returned to his or her country of origin.*

17. Regulation 3 of the 2006 Regulations provides:

> *3. (1) Subject to paragraph (2), these Regulations apply to the following decisions (in these Regulations referred to as "protection decisions") made on or after the coming into operation of these Regulations:*
>
> *(a) a recommendation under section 13(1) of the 1996 Act;*
>
> *(b) an affirmation under paragraph (a) or a recommendation under paragraph (b) of section 16(2) of that Act;*
>
> *(c) the notification of an intention to make a deportation order under section 3(3) of the 1999 Act in respect of a person to whom subsection (2)(f) of that section relates;*
>
> *(d) a determination by the Minister under Regulation 4(4) or 4(5).*

18. Regulation 4 provides:

> *4.(1) (a) A notification of a proposal under section 3(3) of the Act of 1999 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, make an application for subsidiary protection to the Minister within the 15 day period referred to in the notification.*
>
> *(b) An application for subsidiary protection shall be in the form in Schedule 1 or a form to the like effect.*
>
> *(2) 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).*

19. Regulation 3(1) provides that the Regulations apply to certain decisions made on or after the coming into force of the Regulations on 10thOctober, 2006. Paragraph (c) of Regulation 3(1) refers to the notification of an intention to make a deportation order under s. 3(3) of the Immigration Act 1999 in respect of a person to whom s. 3(2)(f) of the Act applies.

20. Section 3 (1) and (2)(f) of the Immigration Act 1999 provide:

> *3.—(1) Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996 , and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.*
>
> *(2) An order under subsection (1) may be made in respect of—*

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

21. I now turn to consider the Supreme Court's judgment in *Izevbekhai v. Minister for Justice, Equality and Law Reform* [2010] IESC 44.

Izevbekhai v. Minister for Justice, Equality and Law Reform [2010] IESC 4

22. The appellants in this case were a Nigerian national mother and her two Nigerian national children. The Minister rejected their asylum applications and made deportation orders in respect of each of them on 23rd November, 2005. The applicants challenged the deportation orders in the High Court but were unsuccessful. Mrs.Izevbekhai then made an application to the Minister for subsidiary protection on behalf of herself and her two children, pursuant to the Protection Regulations. The Minister rejected these applications on the grounds that there was no basis on which he was enabled to exercise his discretion under Regulation 4(2).

23. The Minister's decisions were challenged in the High Court. McGovern J. applied the interpretation of Regulation 4(2) as laid down by Feeney J. in *N.H. v. MJELR* [2008] 4 IR 452 which meant that Regulation 4(2) had conferred a discretion on the Minister to grant subsidiary protection provided that he was satisfied that there were new or altered facts or circumstances that showed a change had taken place in the position of the appellants from that which prevailed at the time the deportation order was made. The Minister had decided that there was no such change. McGovern J. was satisfied that the allegedly new material relied upon by the appellants did not show altered circumstances or new facts but merely amounted to an amplification of the case. He therefore held that there was nothing irrational in the Minister's decision to conclude that there were no grounds upon which he could exercise his discretion under Regulation 4(2).

24. McGovern J.'s decision was appealed to the Supreme Court. On presentation of the appeal it became apparent that the High Court's decision was predicated on Feeney J.'s interpretation of Regulation 4(2), as set out in his decision in *N.H. v. Minister for Justice, Equality and Law Reform* [2008] 4 IR 452.This decision had since been applied in several High Court decisions, but had never been considered by the Supreme Court. Accordingly, the Supreme Court invited the parties to make submissions on the question as to whether Regulation 4(2) does confer on the Minister a discretion to grant subsidiary protection to persons in respect of whom a deportation order had been made and notified before 10th October, 2006, provided that the subject of that deportation order can satisfy the Minister that there are new facts or altered circumstances which significantly change the position of the applicant from that which existed at the time the deportation order was made.

25. Fennelly J. stated that for the purposes of the case before the Supreme Court, only para. (c) of Regulation 3(1), which relates to the proposal to make a deportation order, was relevant. Regulation 3(1)(c) provides:

> *Subject to paragraph (2), these Regulations apply to the following decisions (in these Regulations referred to as "protection decisions") made on or after the coming into operation of these Regulations:*
>
> *[...]*
>
> *(c) the notification of an intention to make a deportation order under section 3(3) of the 1999 Act in respect of a person to whom subsection (2)(f) of that section relates.*

26. Fennelly J. held that the intention in this section was clear:

> *The intention is clear: in future, that is from 10th October 2006, every subject of a deportation order which the Minister proposes to make after that date is guaranteed the right to make prior representations to the Minister that he or she runs the risk of exposure to serious harm if deported to the country of origin. On the other hand, persons against whom deportation orders have been made and notified, though not yet in fact deported are not accorded that right. The paragraph makes no provision for cases of deportation orders made before 10th October 2006, but not yet notified. Section 3(3)(b)(ii) of the Act of 1999 obliges the Minister to "notify the person in writing of his or her decision and of the reasons for it".*

27. The learned judge then proceeded to consider Regulation 4(1) and (2) of the Regulations. Having set out the relevant provisions, Fennelly J. held as follows:

> *55. Regulation 4(1) imposes a positive obligation on the Minister, but its area of application is limited to cases of deportation orders which the Minister proposes to make after 10th October 2006. As I have said at paragraph 54, it makes no provision for deportation orders already made but not notified.*
>
> *56. As stated earlier in this judgment, the Minister made the three deportation orders in respect of the appellants on 23rd November 2005, which was prior to the coming into operation of the Regulations. He gave notice of these orders on 29th November 2006. Section 3(3) of the Immigration Act, 1999 obliges the Minister to give notice in writing of a proposal to make a deportation order. The appellants were properly notified. Regulation 4(1)(a) of the Regulations applies only to a notification of such a proposal. The wording of that provision is capable of applying only to such notifications given after the coming into operation of the Regulations, i.e. after 10th October 2006.*
>
> *57. Section 3(2) (f) of the Act of 1999 applies to "a person whose application for asylum has been refused by the Minister." Regulation 4(2) expresses a negative proposition: it specifies what the Minister is not obliged to do. It contains no words purporting to confer any positive power or discretion on the Minister. It is the centre of the issue under consideration.*

28. Fennelly J. went on to state at para. 75 of his judgment:

> *75. In my view, Regulation 3 is crucial and clear in its own terms. It limits the scope of application of the Regulations. It provides that the Regulations "apply to the following decisions," which it then specifies. For the purposes of the present case, it is crucial that it limits the scope of the Regulations to cases described in Regulation 3(1)(c) where "the notification of an intention to make a deportation order under section 3(3) of the 1999 Act in respect of a person to whom subsection (2)(f) of that section relates" is communicated after 10th October 2006.*

29. The learned judge thus held at para. 86 of his decision:

> *86. In the final analysis, the appellants support the interpretation of Regulation 4(2) adopted in the High Court decisions*

since N.H. v MJELR. That is that the Minister, while not obliged to reconsider deportation orders made prior to the entry into force of the Regulations, has a discretion to do so in the limited circumstances that the person subject to that order can point to new facts or altered circumstances which now justify the grant of subsidiary protection, even though the facts at the time the order was made did not support such a conclusion. The appellants have not pointed to any provision of the Directive which requires the Member States to adopt any such provision. The Directive does not address at all the status of prior deportation orders. It does not concern itself with any particular national or administrative procedures. It confers a right as from 10th October 2006 to be considered for subsidiary protection on the defined category of persons. It says nothing about persons who have received such consideration prior to that date. It is not contended in the present case that the State has failed in its obligation to transpose the Directive correctly into Irish law.

30. Accordingly, Fennelly J. concluded at para. 88:

> *88. For these reasons, I would hold that Regulation 4(2) of European Communities (Eligibility for Protection) Regulations (S. I. No. 518) 2006 does not confer on the Minister discretion to reopen or reconsider deportation orders made prior to 10th October 2006 in response to an application from the subject of such an order for subsidiary protection.*

Nawaz v. Minister for Justice (Case 604-12)
31. The applicant has sought to argue that the Qualification Directive does not impose any time limit for subsidiary protection applications and that eligible persons may still be eligible if they applied 2 weeks or 2 years after a proposal to deport was issued. In support of this contention, the applicants rely on the decision of the Court of Justice in *Nawaz v. Minister for Justice* (Case 604-12). At para. 38 the Court of Justice stated:

> *38. It should be recalled that Directive 2004/83 does not contain any procedural rules applicable to the examination of an application for international protection. It is Directive 2005/85 which establishes minimum standards applicable to procedures for examining applications and specifies the rights of asylum seekers.*
>
> *39. However, Directive 2005/85 applies to applications for subsidiary protection only where a Member State establishes a single procedure under which an application is examined by reference to both forms of international protection, namely asylum and subsidiary protection (Case C?277/11 M. EU:C:2012:744, paragraph 79).*

However, it does not seem to me that this judgment assists the applicant's case in circumstances where I am bound by the Supreme Court's decision in *Izevbekhai*.

Decision
32. The applicant in this case was notified of the Minister's intention to deport her by letter dated 7th April, 2006; this was before the Protection Regulations came into force on 10th October, 2006. His notification of intention to deport pursuant to s. 3(3) of the Immigration Act 1999, did not, therefore, include any reference to the possibility of making a subsidiary protection application.

33. The applicant submits that the Minister's failure in the years following the 10th October, 2006, to inform the applicant of his entitlement to make an application for subsidiary protection, which the applicant says he was obliged to do under section 3(3) of the Immigration Act 1999, as imposed by Regulation 4 of the Protection Regulations, unlawfully denied the applicant the opportunity to make such an application to the respondent. The applicant contended that the respondent is thereby estopped from alleging that the applicant is out of time to make the application.

34. However, it seems to me that this submission is misconceived: the applicant received a proposal to deport in April 2006, which was before the coming into force of the Regulations. It is clear from Fennelly J.'s judgment in *Izevbekhai* that persons who received a proposal to deport before the coming into force of the Regulations are not covered by the terms of the Regulations and are, consequently, not eligible to apply for subsidiary protection.

35. The classes of persons to whom the Regulations apply are strictly limited. The Minister has no discretion to accept applications from persons who are not specified as eligible in the terms of the Regulations themselves. Fennelly J. stated that Regulation 3 limits the scope of the Regulations to cases described in Regulation 3(1)(c) where "*the notification of an intention to make a deportation order under section 3(3) of the 1999 Act in respect of a person to whom subsection (2)(f) of that section relates*" is communicated after 10th October, 2006.

36. I am satisfied that because the applicant in this case received her notification of intention to deport pursuant to s. 3(2)(f) prior to the coming into force of the Regulations she is not a person to whom the Regulations apply and, consequently, is not eligible to apply for subsidiary protection. The Minister, moreover, did not have the power to accept the applicant's application since the applicant is not an eligible person under the Regulations.

37. Accordingly, the Court must answer the central question posed in these proceedings in the negative: the Minister did not have the power to accept an application for subsidiary protection from this applicant since she was furnished with a notification of intention to deport by letter dated 7th April, 2006, which was prior to the coming into force of the Regulations on 10th October, 2006. It is clear from the Supreme Court's decision in *Izevbekhai* that the Minister has no discretion to accept subsidiary protection applications from persons such as this applicant to whom the Regulations do not apply and that such persons are not entitled to apply for subsidiary protection.

Did the Minister change reasons?
38. There is a dispute between the parties as to whether the Minister did in fact change his reasons for rejecting the applicant's application. The applicant argues that the Minister's original reason for refusing the applicant's application for subsidiary protection is erroneous and that the decision should therefore be quashed.

39. The respondent, however, is no longer standing over the original reason given for rejecting the applicant's application and has instead put forward a different explanation as to why the applicant's application had to be rejected. This explanation is that in accordance with the Supreme Court's interpretation of the Protection Regulations as set out in *Izevbekhai*, the Minister had no discretion to accept an application for subsidiary protection from the applicant who, in turn, had no right to apply for subsidiary protection.

40. The respondent submits that the applicant has sought to characterise this as the substitution of new reasons for the decision

made by the Minister in place of the original reasons but that this is not in fact the case. The Minister's position is that, in accordance with the terms of the Protection Regulations and the decision in *Izevbekhai*, she did not have the power to accept the purported application of the 10th July, 2013. Accordingly, the respondent submits that the precise reasons given by the Minister for not entertaining the application are ultimately not material to the question whether or not she was empowered to accept it.

41. The applicant maintains that it is not open to the Minister, as a matter of law, to change the reasons for her decision, and a number of authorities were cited in support of this contention.

42. It seems to me that what happened in this case was that the Minister realised – albeit belatedly – that she lacked jurisdiction to accept and consider a subsidiary protection from this applicant in the first place, since the Regulations do not permit this applicant to make an application, and nor do they confer on the Minister a discretion to accept or consider such an application.

43. The Minister in the Statement of Opposition expressly stated that she does not stand over the reason stated in the letter of 12th July, 2013, based on Recital 9 of the Qualification Directive. I will therefore permit the respondent to advance the argument that she did not have jurisdiction to entertain an application on behalf of the applicant for subsidiary protection. However, this is a matter which may be reflected in the appropriate costs order at the conclusion of the proceedings.

Should the court grant certiorari?

44. In this case, it seems to me that by accepting and considering the applicant's subsidiary protection application, and then purporting to reject it on the basis of Recital 9, the Minister was, in effect, acting in excess of jurisdiction; she did something which she did not have the power to do. Her decision is therefore void and of no effect. In such circumstances, the Court would ordinarily grant *certiorari*.

45. However, it seems to me that it would be futile to quash the Minister's decision in the circumstances of the present case because it would be of no benefit to the applicant. The court cannot grant an order of *mandamus* compelling the respondent to accept and consider the applicant's application because the Regulations, as interpreted by the Supreme Court in *Izevbekhai*, preclude the making of such an order: the court cannot order the respondent to do something which he does not, in law, have the power to do.

46. The respondents rely on *The State (Polymark (Ireland) Ltd) v. The Labour Court and The Irish Transport and General Workers' Union* [1987] ILRM 357 in support of their submission that the court will refuse to grant *certiorari* where to do so would be futile. In the course of his judgment, at p. 362 of the report, Blayney J. quoted with approval the following passage from the judgment of O'Higgins CJ in *The State (Abenglen) v. Dublin Corporation* [1984] IR 381 at p. 393:

> *In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari ex debito justiciae if he can establish any of the recognised grounds for quashing; but the court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the court to act otherwise, almost as of course, once an irregularity or defect is established in the impugned proceedings, would be to debase this great remedy.*

47. Blayney J. then held at pp. 362-63:

> *This passage reaffirms that certiorari is a discretionary remedy, and the conclusion I have come to is that even if there was a breach of principles of natural justice, the circumstances of the case are such that in exercise of my discretion I should refuse to make the conditional order absolute.*
>
> *My principal reason is that the granting of an order of certiorari is not necessary for the protection of the prosecutor's legal rights in the sense that it could not in any way protect them. If the determination of the Labour Court is quashed, this will have no effect on the equal pay officer's recommendation which I have found to have been validly made. Her recommendation will remain binding on the prosecutor. In these circumstances the quashing of the Labour Court's determination would be pointless. It would in no way alter the position which has resulted from my finding in regard to the first ground, namely, that there was a valid recommendation made by the equal pay officer which is binding on the prosecutor.*
>
> *As well as being pointless, an absolute order would, for the reason I have already given, be of no benefit to the prosecutor, and this is a relevant consideration to be taken into account in exercising my discretion. This was the ground upon which Walsh J. based his refusal to make an order of certiorari in the Abenglen case. He said in his judgment:*
>
> *If I am correct in this, then an order of certiorari quashing the decision made by the respondents would be of no benefit to Abenglen. While the Court could make such an order in the present case, the Court in its discretion could refuse to do so where that would not confer any benefit upon Abenglen. (at p. 397).*

48. Having held that the Protection Regulations preclude the Minister from accepting a subsidiary protection application from the applicant, and do not entitle the applicant to apply for subsidiary protection, I am of the view that quashing the Minister's original decision would be of no benefit to the applicant. In light of Blayney J.'s dictum in *The State (Polymark (Ireland) Ltd) v. The Labour Court and The Irish Transport and General Workers' Union* [1987] ILRM 357, it seems to me that in such circumstances the court ought in its discretion to refuse *certiorari*.

49. Accordingly, this application for judicial review must be rejected and the reliefs sought are refused.