THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO 2015/583 JR.]

BETWEEN

A. A. F.

APPLICANT

AND

THE OFFICE OF THE REFUGEE APPLICATIONS COMMISSIONER, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Ms Justice Faherty dated the 23rd day of February, 2018

1. On 23rd November, 2015, by order of the High Court (Mac Eochaidh J.) the applicant was granted leave to seek judicial review by way, *inter alia*, of an order of *certiorari* of the decision of the first named respondent dated 17th June, 2015, not to consider the applicant's application for subsidiary protection. A short extension of time was required for the commencement of these proceedings which the court was satisfied to grant.

Background

2. The applicant is a Somali national. Having been refused a declaration of refugee status in Ireland in December, 2005, he made representations pursuant to s. 3 of the Immigration Act 1999 ("the 1999 Act"). He was granted permission to remain in the State "as an exceptional measure" on 9th August, 2011.

3. On 5th January, 2015, the applicant applied for subsidiary protection. On 16th January, 2015, the Refugee Applications Commissioner ("the Commissioner") drew the applicant's attention to the judgment of the High Court in *A.A. v. Minister for Justice* [2014] IEHC 607, and advised him that the Commissioner was precluded from accepting his application for subsidiary protection because he had been refused refugee status before the coming into effect of the European Communities' (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations") on 10th October, 2006.

4. On 23rd January, 2015, the applicant's solicitors responded arguing that the Commissioner retained a discretion to admit a late application for subsidiary protection from persons in the applicant's position so as to give effect to Article 18 of Council Directive 2004/83/EC ("the Qualification Directive") By letter of the same date, the applicant's solicitors wrote to the Ministerial Decisions Unit of the Irish Naturalisation and Immigration Service ("INIS") in the second named respondent's department, again arguing that the Commissioner or the second named respondent, or both, must have a discretion to admit a late application for subsidiary protection "in order to comply with the requirement of effective implementation of the right to subsidiary protection in Directive 2004/83/EC."

5. The Commissioner replied on 5th February, 2015, reiterating the position that as the applicant had been refused refugee status in December, 2005, he was precluded from making an application for subsidiary protection.

6. By direction of the second named respondent, on 12th February, 2015, INIS wrote to the applicant's solicitors advising that in the event that the applicant had a protection issue he wished to have investigated, it would be open to him to seek to be re-admitted to the asylum process pursuant to s. 17(7) of the Refugee Act 1996, as amended ("the 1996 Act"). The response of the applicant's solicitors to this suggestion was that readmittance to the asylum process was not the appropriate remedy and that the applicant wished to exercise his right to subsidiary protection under the Qualification Directive.

7. However, on 2nd April, 2015, the applicant duly made an application pursuant to s. 17(7) of the 1996 Act, stating that he was constrained to do so by virtue of the refusal of the Commissioner to accept his application for subsidiary protection. It was argued that the second named respondent should consent to the s. 17(7) application on the basis, *inter alia*, that the applicant was a Somali national from a minority clan and that he would be at risk of both persecution and serious harm if he were returned to Somalia. As an indicator of new elements for readmittance to the asylum process, the applicant furnished the second named respondent with country of origin information. It was also submitted on his behalf that "the subsidiary protection regime established in 2006 should also be considered a 'new element' relating to [the applicant's] entitlement to protection in the State"

8. The s. 17(7) application was refused on 9th June, 2017.

9. On 12th June 2015, the applicant's solicitors wrote to the Commissioner advising that since both the subsidiary protection and the s. 17(7) applications had been refused, the applicant had been left without the possibility of applying for protection in the State. Accordingly, the Commissioner was requested, on an exceptional basis, to accept the application for subsidiary protection.

10. The Commissioner responded (the impugned decision) on 17th June, 2015, advising as follows: -

> "As previously stated in our correspondence of 16th January 2015 and 05 February 2015, the Commissioner is not in a position to accept an application for Subsidiary Protection
>
> As you are aware, with effect from 14th November 2013, responsibility for processing all existing and future subsidiary protection applications transferred from the Irish Naturalisation and Immigration Service (INIS) to the Office of the Refugee Applications Commissioner (ORAC) under the European Union (Subsidiary Protection) Regulations 2013 (SI No. 426 of 2013). Section 3 of the Regulations provides for a system of the investigation and determination of applications for subsidiary protection in the State which involves the processing of:
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> 1. applications for subsidiary protection made to the Minister … prior to the commencement date of the 2013 Regulations, which have not been determined, and
>
> 2. new applications for subsidiary protection made from 14th November 2013. This relates to applicants that have been

issued with a decision to refuse a declaration of refugee status by the Minister, since the regulations came into effect on 14th November, 2013, together with notification that they may make an application for Subsidiary Protection to the Office of the Refugee Applications Commissioner within 15 working days from the date of the notification, in accordance with Regulation 34 of the European Union (Subsidiary Protection) Regulations 2013.

Therefore, I wish to advise that the Commissioner is not in a position to accept an application for Subsidiary Protection from [the applicant] as such an application would not come within the categories mentioned at 1. and 2. above. ORAC can only process applications for Subsidiary Protection for which it has been given jurisdiction by the Minister, otherwise it would be acting *ultra vires*."

The first respondent again made reference to the decision of Barr J. in *A.A. v. Minister for Justice.*

11. The applicant's solicitors had also written to INIS on 12th June, 2015, in respect of the refusal to readmit the applicant to the asylum process. They argued that the impact of the decision was that the applicant was also left with no possibility of applying for subsidiary protection and that he was therefore "totally excluded from seeking the State's protection – notwithstanding that he is a member of a category of persons … who are … granted protection in Ireland as a matter of routine." It was stated that the applicant was left "without an effective remedy and unable to exercise his rights under Council Directive 2004/83/EC."

12. This letter was treated by the second respondent as a request for a review of the s. 17(7) decision. The applicant's solicitors made further representations in respect of the s. 17(7) review on 14th August, 2015. It was submitted, *inter alia*, that "even if not entitled to refugee status [the applicant] is entitled to subsidiary protection on the basis that there is an internal armed conflict in Somalia" and that "in order that effect should be given to Directive 2004/83/EC, [the applicant] must be given consent to make a subsequent application for refugee status in order to facilitate the making of an initial application for subsidiary protection." The second named respondent was referred to 2014 country of origin information which described the extent of armed conflict in Somalia. It was submitted that in light of the real risk of serious and individual threat to the applicant's life by reason of indiscriminate violence in Somalia, "he must be readmitted to the refugee process."

13. On 21st September, 2015, the refusal to admit the applicant to the asylum process was upheld. This refusal is not challenged in the within proceedings. However, it is argued on the applicant's behalf that the s. 17(7) refusal is part of the context of the applicant's efforts to solve the problem of his protection status in the State.

14. In these proceedings, the core argument advanced on behalf of the applicant is that his situation has not been considered under Article 15(c) of the Qualification Directive. It is argued that the refusal of the Commissioner to consider the applicant's application for subsidiary protection unlawfully deprives him of his rights under the Directive.

The relevant legislative provisions

15. Article 1 of the Qualification Directive describes that the subject matter and scope of the Directive "is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted."

Article 2 (e) reads as follows: -

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

Article 2 (f) defines "subsidiary protection status" as

> "the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection".

Article 15 provides:

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

Article 18 states:

> "Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V."

Article 38 provides:

> "1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006. They shall forthwith inform the Commission thereof.
>
> When the Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
>
> 2.Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive."

16. The 2006 Regulations, which were made on 9th October 2006, and came into force on 10th October, 2006, gave effect to the Qualification Directive. Regulation 3 of the 2006 Regulations provides:

> "(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:
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> (a) a recommendation under section 13(1) of the 1996 Act;
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> (b) an affirmation under paragraph (a) or a recommendation under paragraph (b) of section 16(2) of that Act;
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> (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).
>
> (2) Nothing in these Regulations shall be taken to extend or reduce the functions of the Refugee Applications Commissioner or the Refugee Appeals Tribunal (within the meaning of the 1996 Act) in determining whether a person is a refugee."

Regulation 4 states: -

> "(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.
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> (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).
>
> (3) In determining whether a person is eligible for subsidiary protection, the Minister—
>
> (a) shall take into consideration, in addition to matters mentioned in Regulation 5, any particulars furnished by the applicant under paragraph (1)(b); and
>
> (b) may take into consideration—
>
> (i) the information or documentation taken into consideration in relation to the determination of the applicant's application for a declaration, and
>
> (ii) such other information relevant to the application as is within the Minister's knowledge.
>
> (4) Where the Minister determines that an applicant is a person eligible for subsidiary protection, the Minister shall grant him or her permission to remain in the State.
>
> (5) Where the Minister determines that an applicant is not a person eligible for subsidiary protection, the Minister shall proceed to consider, having regard to the matters referred to in section 3(6) of the 1999 Act, whether a deportation order should be made in respect of the applicant.
>
> (6) Nothing in these regulations shall affect the discretionary power of the Minister under section 3 of the 1999 Act."

17. The European Union (Subsidiary Protection) Regulations 2013 ("the 2013 Regulations") came into operation on 13th November, 2013 and replaced the subsidiary protection system which had been established by the 2006 Regulations. The 2013 Regulations transferred responsibility for the investigation of applications from the second named respondent to the Commissioner. On 20th April, 2015, the provisions of the 2013 Regulations were amended by the European Union (Subsidiary Protection) (Amendment) Regulations 2015 ("the 2015 Regulations") in light of, *inter alia*, the judgment of the ECJ in case C-604/12 *H.N. v Minister for Justice*, (8th May, 2014).

18. On 17th June, 2015, when the impugned decision was made, an application for subsidiary protection was defined by Regulation 2 of the 2013 Regulations, as amended by the 2015 Regulations, as:-

> "(a) an application for a subsidiary protection declaration made in accordance with Regulation 3(1), or an application as deemed under paragraph (2) or (3) of Regulation 3, to be such an application or
>
> (b) an application for a subsidiary protection declaration made under Regulation 3(A) where, under paragraph (7) that regulation, Regulations 4-20 apply to the application"

19. In summary, under the 2013 Regulations, the situations in which the Commissioner may determine applications for subsidiary protection are:

> (1) Applications made in response to a notice sent by the second respondent refusing a declaration of refugee status under s. 17(5) of the Refugee Act 1996 (as amended by Regulation 34 of the 2013 Regulations): (Regulation 3(1))
>
> (2) Applications which were outstanding before the second respondent on the commencement date of the 2013 Regulations: (Regulation 3(2))
>
> (3) Applications made under the 2006 Regulations after the commencement of the 2013 Regulations but within fifteen days of the Minister's proposal to deport which had informed the applicant of the right to apply for subsidiary protection

under the 2006 Regulations (a transitional provision): (Regulation 3 (3))

(4) Applications for a subsidiary protection made by a person who is an applicant for refugee status (i.e. "concurrent" applications): (Regulation 3 (3A)).

20. It is accepted by all concerned that the 2013 Regulations contain a comprehensive enumeration of the situations in which the Commissioner may accept applications for subsidiary protection and that the Regulations preclude the acceptance of a subsidiary application from the applicant.

21. The provisions of the 2006 Regulations were considered by the Supreme Court in *Izevbekhai v. Minister for Justice* [2010] IESC 44. In that case, the applicant had been the subject of a deportation order made prior to 10th October, 2006. After a legal challenge to the deportation order had been dismissed, the applicant and her children applied for subsidiary protection under the 2006 Regulations, relying on a purported discretion of the second respondent under Regulation 4(2) of the 2006 Regulations to entertain such applications. On the assumption that he had such a discretion, the second respondent examined the applications but concluded that they added little to material previously considered. The applicants were accordingly advised that there was nothing in the applications to warrant an exercise of a discretion under Regulation 4(2) to accept the subsidiary protection applications.

The applicants sought judicial review of the second respondent's decision in the High Court. All parties proceeded on the assumption that the second respondent had discretion whether to accept the subsidiary protection applications. It was determined ultimately that the second respondent's decision not to accept the applications was reasonable. The applicants appealed to the Supreme Court. Off its own motion, the Supreme Court raised the issue as to whether the second respondent had any discretion to entertain the subsidiary protection applications. It was held that there was no such discretion under Regulation 4(2) of the 2006 Regulations. Writing for the majority of the Supreme Court, Fennelly J. put the matter as follows: -

> *"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.*
>
> *That limitation is itself closely related to the content of Regulation 4(1)(a) which obliges the Minister to give a specific type of notice to persons to whom he communicates notifications of the kind mentioned on Article 3(1)(c)*
>
> *...*
>
> *I have come to the conclusion that the interpretation of Regulation 4(2) by Feeney J in N.H. v MJELR and hence by a number of other judges of the High Court was erroneous. I do not find any basis in the language of that provision, read either alone or together with related provisions which can justify the implication of a power. What is at issue here is not an obligation for the Minister but a discretionary power. What is more, as explained, it is a discretion limited to cases where the Minister accepts that new facts or altered circumstances have been shown to have arisen. That is a large edifice to build on the words "shall not be obliged." (emphasis added), the words of the Regulations said to convey that power." (at paras. 75-80)*

22. Thus, the Supreme Court determined that Regulation 3 of the 2006 Regulations limited the scope of the Regulations to cases where the relevant decision, viz, where the notification of an intention to make a deportation order under s. 3(3) of the 1999 Act was communicated after the 10th October 2006.

23. The approach of the Supreme Court was followed by Barr J. in *A.A. v Minister for Justice.* The learned Judge found that the second respondent did not have discretion to accept an application for subsidiary protection under the 2006 Regulations where the applicant had been refused a declaration of refugee status and the Minister had proposed to deport her prior to 10th October, 2006. In *A.A.*, Barr J. put the matter as follows: -

> *"30. The applicant in this case was notified of the Minister's intention to deport him by letter dated 13th February, 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.*
>
> *31. 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 European Communities (Eligibility for Protection) Regulations 2006, unlawfully denied the applicant the opportunity to make such an application to the respondent; and that the respondent is thereby estopped from alleging that the applicant is out of time to make the application.*
>
> *32. However, this submission appears to be misconceived: the applicant received a proposal to deport in February 2006, which was before the coming into force of the Regulations. It is clear from the judgment of Fennelly J. 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.*
>
> *33. 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.*
>
> *34. I am satisfied that because the applicant in this case received his notification of intention to deport pursuant to s. 3(2)(f) of the Immigration Act 1999 , as amended, prior to the coming into force of the Regulations, he 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 he is not an eligible person under the Regulations.*

> *35. The Court must therefore 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 he was furnished with a notification of intention to deport by letter dated 13th February, 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."*

A similar approach was adopted by McDermott J. in *K.A. v. Minister for Justice* [2015] IEHC 67.

The applicant's submissions

24. The applicant submits that there is nothing in the Qualification Directive which suggests that a person who has been refused a declaration of refugee status in a Member State before the date of transposition of the Directive is precluded from making an application for subsidiary protection. Specifically, it is argued that there is nothing in Article 18 of the Qualification Directive (the core obligation from which the applicant derives his right) to imply that a person who received a notice of proposal to deport might be deprived of an opportunity to apply for subsidiary protection. Nor is there any temporal restriction in Article 2(e) which defines what 'subsidiary protection status' means.

25. It is acknowledged that were the second respondent to terminate the leave to remain and issue a proposal to deport the applicant, the second respondent would have to consider the applicant's circumstances having regard to s. 5 of the 1996 Act and having regard to the Criminal Justice (United Nations Convention Against Torture) Act 2000 ("the 2000 Act") and the European Convention on Human Rights Act, 2003 ("the 2003 Act"). However, this consideration would not include a consideration of the applicant's circumstances under Article 15(c) of the Qualification Directive. What the applicant seeks is recognition that he is entitled to the protection from harm as defined by Article 15(c). While it is accepted that the objective of the Qualification Directive is to set minimum standards, the underlying purpose is to ensure that the Geneva Convention is properly applied and to ensure and create subsidiary protection across the EU so that persons, apart from refugees, who are need of protection will receive such protection. Counsel points to the fact that the applicant's leave to remain decision makes no reference to the recognition that to send him back to Somalia would be contrary to s. 5 of the 1996 Act or to the provisions of 2000 and 2003 Acts. At best, the applicant has a discretionary temporary leave to remain.

26. Counsel contends that it was not argued before the Supreme Court in *Izevbekhai* that the 2006 Regulations failed to properly transpose the Qualification Directive into law, which is the case the applicant makes. Furthermore, in *Izevbekhai* the applicants had had the benefit of a full asylum and *refoulement* process, including an Article 3 ECHR consideration. This was clearly expressed by Fennelly J. when he stated: -

> *"…the complaint of risk of serious harm had already been considered prior to the entry into force of the transposing regulations..."*

This is entirely different to the applicant's factual scenario since he has never had a formal *refoulement* determination. In effect, there is no finding that the applicant is not at risk from serious harm. There is at best an implied finding that he is at risk since he has not been returned to Somalia.

27. It is submitted that it is clear both from *Izevbekhai* and *A.A. v Minister for Justice* that no Irish court has yet ruled on whether national procedural rules which preclude a person refused refugee status before the date of transposition of the Qualification Directive from applying for subsidiary protection are themselves precluded by the principle of effectiveness, and whether the existence of such rules means the Directive has been inadequately transposed.

28. It is the applicant's further submission that *Izevbekhai* is not authority for the proposition that someone in the applicant's position cannot apply for subsidiary protection on the sole basis that he got a proposal to deport letter prior to 10th October, 2006, particularly in circumstances where his leave to remain application was only determined by the second respondent in 2011 and in circumstances where he has not received a formal *refoulement* decision.

29. While it is accepted that subsidiary protection status can only have been acquired in Ireland since 10th October, 2006, it is submitted that the contents of the Qualification Directive admit of the possibility of the making of an application for subsidiary protection by a person who was refused refugee status before the date of transposition. This is so in order to give present effect to situations which arose before the date of transposition and which continue. Furthermore, it is clear from *Izevbekhai* (para. 46) that the emphasis was on the fact that a deportation order had issued, which is not the case here. It is also submitted that the decision in *A.A v. Minister for Justice* is distinguishable as it was not argued in that case that the Qualification Directive has not been properly transposed.

30. It is submitted that support for the applicant's contention that the Directive confers on him a right to apply for subsidiary protection is found in Case C-604/12 *H.N. v.* Minister for Justice and Case C-429/15 *Danqua v. Minister for Justice* (20th October, 2016).

31. In order for the Directive to be effective, it is necessary that the competent authorities should be in a position to recognise a present possibility of a risk of harm and a need for protection, although these risks may have arisen before transposition of the Directive. Accordingly, the applicant's case is distinguishable from *Izevbekhai* and A.*A. v Minister for Justice* because the principle of effectiveness was not relied on in either case; both were decided solely by reference to the 2006 Regulations, not to the Directive.

32. It is submitted that the object of the Directive is to protect the rights of people in need of protection. As a result, the Court should not adopt a restrictive approach to the rights protected by the Directive such as to deprive the Directive of its effectiveness. Accordingly, the issue for the court is whether the State has failed to properly transpose the Directive.

33. It is also contended that there is no merit in the respondents' argument that the applicant delayed in applying for subsidiary protection in circumstances where the core of the applicant's case is that the State has not properly transposed the Directive into law. In any event, any delay on the part of the applicant does not prejudice the State. This is so in circumstances where it took the second respondent five years to decide on the applicant's leave to remain application.

The submissions advanced on behalf of the respondents

34. At the outset, the respondents submit that the applicant seeks to make a claim for a subsidiary protection where no such need arises. This is so in circumstances where the applicant has leave to remain in the State since 2011. It is submitted that his objective in applying for subsidiary protection is not to secure his fundamental rights; rather it is to upgrade his status in the State. Moreover,

since August, 2016, he has a five year residence permit. He therefore satisfies the habitual residence condition for social welfare purposed under EU law. Furthermore, it is open to him to apply for long term residency and, in principle; he is eligible to apply for naturalisation. It is submitted that this is how far removed the applicant is from being at risk in respect of his fundamental rights.

35. It is further submitted that the applicant has delayed in seeking to invoke a purported right to subsidiary protection, a right which was asserted almost nine years after the coming into force of the 2006 Regulations.

36. While the applicant complains that the 2006 and 2013 Regulations are framed in a way that do not allow people whose applications for asylum were dealt with prior to 10th October, 2006, to apply for subsidiary protection, it remains the case that this particular complaint was open to the applicant to make since October, 2006. It is submitted that if there was a real protection need on the applicant's behalf he would have applied for subsidiary protection earlier than January, 2015. Contrary to the applicant's assertion, it is not correct that his delay in applying for subsidiary protection would cause no prejudice to the respondent. If the applicant is found to be correct in his submission that his application for subsidiary protection should have been accepted by the Commissioner, this would have far-reaching consequences for the State as it would involve the revisiting and unravelling of historic protection decisions.

37. In any event, irrespective of the applicant's delay in applying for subsidiary protection, it is submitted that his application was bound to fail for the reasons set out by Barr J. in *A.A.v. Minister for Justice* and by McDermott J. in *K.A. v Minister for Justice*.

38. The respondents maintain that the applicant's circumstances are on all fours with the position of the applicant in *A.A. v. Minister for Justice*. In that case, the applicant sought to distinguish *Izevbekhai* on the basis that he had not received a deportation order. It was thus argued that the applicant should have been allowed to make an application for subsidiary protection. These are essentially the same facts as those of the applicant. However, the arguments advanced in *A.A. v. Minister for Justice* were rejected and Barr J. was satisfied to follow *Izevbekhai*. It is submitted that the judgment in *Izevbekhai* is a clear authority that the 2006 Regulations did not apply to the applicant.

39. Insofar as the applicant seeks to distinguish *Izevbekhai* on the basis that in that case there was a concluded determination on *refoulement*, and on the basis that the Supreme Court did not consider the question whether the Qualification Directive was properly transposed into Irish law, it is the respondent's essential contention that the Directive does not speak of a right to a concluded determination. Insofar as there is a right to be protected, it is the right not to be returned to a country where there is a risk of persecution or serious harm. As far as the applicant is concerned, irrespective of whether the proposal to deport him was made before or after 10th October, 2006, both timeframes bring the statutory protections effected by the 1996 Act, the1999 Act, the 2000 Act and the 2003 Act into play. Following upon the proposal to deport the applicant the respondent was under a statutory obligation to consider the *refoulement* issue. Accordingly, the applicant cannot challenge his status on the basis that he was not considered since he obtained leave to remain in the State. Moreover, in *Izevbekhai*, Fennelly J. emphasised what is important is what is considered in the context of a proposal to deport i.e. consideration of the question of serious harm, not just the fact that a deportation order is made.

40. The applicant's right to be protected was put in play before 10th October, 2006 and it was considered in accordance with national and international obligations as they stood at the time of the application for refugee status. Post October, 2006, there was only a change in the legal system to determine rights, which change is prospective. Therefore, the principle of effectiveness, as enunciated by the ECJ in *Danqua* and *H.N.*, have no applicability to the present case.

41. It is submitted that what the applicant seeks is to impute a substantive right into what is effectively a procedural principle of harmonisation. Even if Ireland had a single system in January, 2015, as opposed to a bifurcated system, the applicant still could not have revisited asylum issue given that his claim for refugee status was determined in 2005.

Considerations

42. It is common case that pursuant to the provisions of the 2013 Regulations, the applicant is precluded from applying for subsidiary protection status. The applicant's application for subsidiary protection is not covered by Regulation 3(2) or (3) of the 2013 Regulations because he did not apply for subsidiary protection until January 2015. Equally, the applicant does not fall under Regulation 3(A) because his application for refugee status was determined in 2005. Moreover, the applicant was always precluded from applying for subsidiary protection under the 2006 Regulations because his asylum application was rejected prior to the coming into force of the 2006 Regulations and because the letter notifying him of a proposal to deport also predated the coming into force of the 2006 Regulations.

43. The applicant's central thesis is that the respondents have failed to correctly transpose the Qualifications Directive which, the applicant contends, confers upon him the right pursuant to Article 18 to apply and be considered for subsidiary protection. It is submitted that there is nothing in the Directive that imposes the kind of temporal restrictions which were set out in the 2006 Regulations and which are equally contained in the 2013 Regulations.

44. In aid of his submissions that the Qualification Directive confers a right to apply for subsidiary protection, counsel for the applicant relies on the decisions of the ECJ in *H.N. v. Minister for Justice* and *Danqua v. Minister for Justice.*

45. In *H. N.*, the question put before the ECJ was whether the Qualification Directive permitted a Member State (Ireland) to provide in its law that an application for subsidiary protection can be considered only if the applicant has applied for and been refused refugee status in accordance with national law. In the course of its judgment, the ECJ opined, *inter alia*, as follows:

> *"26. It should be recalled, first of all, that in its definition of 'international protection', Directive 2004/83 refers to two separate systems of protection, namely the system governing refugee status and that relating to subsidiary protection status.*
>
> *…*
>
> *29. Article 2(e) of Directive 2004/83 defines persons eligible for subsidiary protection as third country nationals who do not qualify as a refugee.*
>
> *30. The use of the term 'subsidiary' and the wording of Article 2(e) of Directive 2004/83 indicate that subsidiary protection status is intended for third country nationals who do not qualify for refugee status.*
>
> *31. Moreover, it is apparent from recitals 5, 6 and 24 in the preamble to Directive 2004/83 that the minimum*

requirements for granting subsidiary protection must serve to complement and add to the protection of refugees enshrined in the Geneva Convention through the identification of persons genuinely in need of international protection through such persons being offered an appropriate status.

32. It is clear…that the subsidiary protection provided by Directive 2004/83 is complementary and additional to the protection of refugees enshrined in the Geneva Convention."

At para. 45 it states:

"The requirement for genuine access to subsidiary protection status means that, at first, it should be possible to submit the application for subsidiary protection at the same time and, second, the application for subsidiary protection should be considered within a reasonable time, which is a matter to be determined by the national court."

46. In *Danqua*, the issue considered by the ECJ was whether the principle of effectiveness must be interpreted as precluding a national procedural rule which requires an application for subsidiary protection status to be made within a period of fifteen working days of notification by the competent authority. The ECJ referred to the principle of effectiveness in the following terms: -

"39.…A national procedural rule, such as that at issue in the main proceedings, must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order. Accordingly, such a rule must ensure, in the present case, that persons applying for subsidiary protection are actually in a position to avail themselves of the rights conferred on them by Directive 2004/83.

40. It is, therefore, appropriate to consider whether a person such as Ms. Danqua, who applies for subsidiary protection, is in concrete terms in a position to assert the rights she derives from Directive 2004/83, namely, in this case, the right to submit an application for that protection and, should the conditions required in order to qualify for such protection be satisfied, the right to be granted subsidiary protection status."

47. The respondents argue that what was sought to be achieved by the Directive was a harmonisation of minimum standards rather than the creation of any new rights. It is also submitted that the introduction of the Directive into Irish law in October, 2006 did not invalidate decisions which were taken under the old standards. The respondents assert that what was required by the Qualification Directive was that Member States prospectively comply, from October, 2006, as regards minimum standards. Specifically, they make the case that the Directive does not confer a right on an individual whose protection application has been considered prior to October, 2006 to make a fresh application. They contend that in the absence of any right vested in the applicant, the principle of effectiveness has no applicability to his circumstances.

48. In order to address the respective arguments of the parties, it is instructive firstly to look at the recitals to the Qualification Directive. Recitals 4 and 5 refer, respectively, to the approximation of rules on the recognition of refugees, and that rules regarding refugee status should be complemented by "measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection. As is clear from recitals 6 and 7, the rationale for the Qualification Directive is to ensure that the criteria for asylum and subsidiary protection are similar across Member States, "to ensure that a minimum level of benefits is available…in all Member States." As provided for in recital 8, and recital 16-23, the emphasis is on minimum standards and the need to harmonise the existing availability of refugee status, including international protection as provided for by the Geneva Convention. Recital 24 requires that minimum standards for the definition and content of subsidiary protection should also be laid down and that subsidiary protection "should be complementary and additional to the refugee protection enshrined in the Geneva Convention". Recital 25 provides:

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

49. Counsel for the respondents submits that the recitals make clear the objective of the Directive, namely a formalisation of existing international obligations under human rights instruments and practices already existing in Member States.

50. I am of the view that the respondents seek to somewhat downplay the benefits of the Qualification Directive. The import of the Directive is that it crystallises the entitlement of a person, who is refused refugee status, to avail of the complementary protection which a grant of subsidiary protection confers, provided that that person satisfies the criteria set out in chapters II and V of the Directive. To my mind, this is reinforced by the ECJ in Danqua when it stated: -

"[T]*he procedure for examining applications for subsidiary protection is of particular importance inasmuch as it enables applicants for international protection to safeguard their most basic rights by the grant of such protection*." (at para. 45)

51. That being said, I do not agree with the applicant's argument, namely that in *H.N.* and *Danqua*, the ECJ was referring to a *freestanding* right to subsidiary protection. To my mind, the emphasis of the Court was directed to the protection which the Directive gives recognition to, namely that where "serious harm" as defined in the Directive is asserted, a person who has not been adjudicated eligible for refugee status shall be entitled to apply for subsidiary protection, and where such "serious harm" is established, be entitled to a grant of subsidiary protection.

52. The applicant also makes the case that in *Izevbekhai*, the Supreme Court did not pronounce on whether the Qualification Directive was properly interpreted by the 2006 Regulations and that the Supreme Court's considerations were confined only to the 2006 Regulations. It is thus contended that the Supreme Court did not examine whether the Qualification Directive was correctly transposed into Irish law. In this regard, counsel for the applicant points to Fennelly J. who stated: -

"It is not contended in the present case that the State has failed in its obligation to transpose the Directive correctly into Irish law." (at para. 86)

53. In *Izevbekhai*, the thrust of the arguments advanced by the applicants was that the limitation on the category of persons who could apply for subsidiary protection (as set out in Regulation 4(4) of the 2006 Regulations) was unlawful and that the applicants should be allowed to apply for subsidiary protection, albeit that they were the recipient of a deportation order. I accept that there was no direct argument on the question of the transposition of the Qualification Directive in *Izevbekhai*. However, it is clear that Fennelly J. looked at the Qualification Directive, and the 2006 Regulations, and found no shortfall in the 2006 Regulations or that they should be interpreted in any other manner so as to give effect to the Directive.

54. In this regard, it is apposite that the Court considers the argument which was advanced before the Supreme Court. This was addressed by Fennelly J., at paras. 71 to 72:

> *"In oral argument, Mr. Michael O'Higgins Senior Counsel for the appellants developed a further argument based on the interpretation of the Regulations in conformity with the Directive. He submitted that the provisions of Article 4.4 of the Directive were novel in that they introduced a presumption that prior suffering of serious harm or threats of the same would be "a serious indication of the applicant's well-founded fear of……real risk of suffering serious harm." He pointed out, in addition, that Regulation 3(1)(d) includes in the decisions to which the Regulations apply "a determination by the Minister under Regulation 4(4)." A determination under Regulation 4(4) is a determination that a person is "eligible for subsidiary protection…" Therefore, under the latter provision, the Minister is obliged to grant subsidiary protection.*
>
> *The Minister made written submissions, firstly, regarding the Directive and, secondly, regarding the Regulations. He submits that the Directive did not have and was not intended to have any retrospective effect. It applied new minimum standards but did not purport to backdate these new standards to decisions already made. He also made submissions, apparently based on an interpretation of travaux préparatoires, in support of this view. I do not propose to deal with this issue, as I consider that it does not arise. There can certainly be an argument as to whether the Directive, as properly interpreted, can affect persons in respect of whom deportation orders have already been made. However, that is a matter for interpretation of the Directive. The written submissions of the Minister do not produce any preparatory document which casts any light on this point. Turning to the Regulations, the Minister submits that they set out the only method in Irish law under which a third-country national can apply for subsidiary protection. Nowhere in Regulation 4 or elsewhere is there any provision conferring a right on a person to make an application for subsidiary protection at any other point than when the Minister gives notice pursuant to Regulation 4(1)(a). Furthermore, Regulation 4(2) limits the category of persons who may apply for subsidiary protection."*

55. It seems to me that while it was not argued in Izevbekhai that the 2006 Regulations did not properly transpose the Directive, it was however argued that the Directive conferred an entitlement on the applicants to apply for subsidiary protection and that the 2006 Regulations had to be interpreted to conform to the Directive. In this regard, Fennelly J. stated, at para. 73:-

> *" I propose to consider, in the first instance, whether the Regulations confer a right upon persons such as the appellants to apply to the minister for subsidiary protection. Put otherwise, do the Regulations oblige the minister to consider such an application for subsidiary protection? It is important to emphasise that these appeals arise solely in the context of the 2006 Regulations and, to the extent that it is relevant, the Council Directive which they transpose…"*

At paras. 85-86 he states:

> *"Is there anything, therefore, in the rules or procedures whereby the minister determines who is eligible for subsidiary protection which, by interpretation in the light of the Directive, would lead the minister necessarily having discretion effectively to reopen a determination already made? Firstly, the definition of "person eligible for subsidiary protection" set out in reg. 3(1) reflects precisely that laid down in art. 2(e) of the Directive. The operative provisions of regs. 3 and 4 provide that an order cannot be made for the deportation of a person from the State without an opportunity being afforded to make representations that the person is eligible for subsidiary protecton. All this is strictly in conformity with the terms of the Directive.*
>
> *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." (emphasis added)*

56. In my view, in light of the foregoing, the Supreme Court did, in fact, consider whether the Directive conferred a right on the *Izevbekhai* applicants to apply for subsidiary protection, and found that it did not. It is clearly stated by Fennelly J. at para. 84 that"*Art. 18 of the Directive is directly and clearly implemented by Reg. 4(4) [of the 2006 Regulations]*". The applicant contends that what Fennelly J. is there saying is merely that there was a direct transposition of Article 18 by virtue of the wording set out in Regulation 4(4) of the 2006 Regulations. It is submitted that the respondents have not referred to any legal authority which states that persons in the old pre-10th October, 2006, system are precluded from applying for subsidiary protection. I find the *dictum* of Fennelly J. to be persuasive authority against the applicant's argument that there is nothing in the Qualification Directive which precludes his application for subsidiary protection, particularly in circumstances where the Directive does not seek to address the position of persons whose asylum claims had been determined before the date of implementation of the Directive.

57. Of particular importance also, to my mind, is that the harmonisation provisions in the Qualification Directive regarding subsidiary protection have been described by the ECJ as complementary to the protections afforded by the Geneva Convention. Thus, the processes mandated by the Directive to give effect to the granting of subsidiary protection are in no small way tied up with a situation where a negative decision is made in respect of an application for refugee status. In *H.N.*, the ECJ effectively rejected the notion that a person could make a standalone subsidiary protection application without applying for refugee status.

58. It is also worthy of note that the harmonisation provisions in the Qualification Directive mirror the harmonisation of the criteria for refugee status. Article 13 deals with the issue of refugees. It provides:

> "Member States shall grant refugee status to a third country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III [of the Directive]"

59. It has never been suggested that someone who was refused refugee status in the State prior to October 2006, obtains a right, by virtue of the Qualification Directive, to apply again for refugee status under Article 13 of the Directive.

I agree with counsel for the respondents that this factor is not insignificant in the context of the arguments being advanced by the

applicant.

60. The applicant has had his rights determined in a pre-Qualification Directive determination and against a backdrop where he was refused refugee status.

61. In 2005, following the refusal of his asylum application, he was the subject of a proposal to deport. This refusal was prior to 10th October, 2006. Ultimately however, the applicant secured leave to remain, albeit there is no written determination underlying that leave. I accept the respondents' submission that before any decision to deport the applicant, the second respondent was bound by international legal instruments and the provisions of domestic law to permit persons who did not qualify as refugees but whose life, person or other fundamental rights would be at risk in their country of origin to remain in the State. It goes without saying that the applicant has the fundamental right not to be returned to his country of origin if his fundamental rights would be put at risk. Accordingly, the second respondent was obliged to consider the application for leave to remain pursuant to s. 5 of the 1996 Act (prohibition of refoulement), s.4 of the 2000 Act and s.3 of the 2003 Act. All of these protective statutes predate the Qualification Directive. As matters stand therefore, the applicant's rights have been determined and no protection issue arises at this time. As the applicant was granted leave to remain, it cannot be said that there exists a risk to his life or person, whatever the situation might be in Somalia. Thus, insofar as it is argued on his behalf that he has not received a determination as to whether he would be exposed to serious harm if returned to Somalia, the position is that there is presently no proposal to deport him to Somalia.

62. The applicant makes the case that the acceptance by the first respondent of his application for subsidiary protection is not to apply the Directive retrospectively. I disagree. I agree with the respondents' argument that, in essence, the applicant is contending that he (and indeed all persons refused refugee status pre- 10th October, 2006) are entitled to avail of the facility of an application for subsidiary protection as provided for by the Qualification Directive and which was required to be put effect by 10th October, 2006. Whatever way one looks at it, that is to apply the Directive retrospectively. Does the Directive admit of such retrospective application? I am satisfied that it does not. This is evident from the very fact that what is effectively provided for in the Directive is that *from the date of implementation* of the Directive, persons who do not qualify for refugee status and who are eligible because of a real risk of "serious harm" will be granted subsidiary protection.

63. In the course of his submissions, counsel for the applicant referred the Court to the decision of the ECJ in Case C-162/09 Secretary of *State for Work and Pensions v. Lassal* (7th October, 2010). The question before the ECJ was whether, for the purpose of acquiring the right of permanent residence provided for in Article 16 of Directive 2004/38 ("the Citizenship Directive"), continuous periods of five years residence completed before April 2006, the date of transposition of the Citizenship Directive, must be taken into account. The ECJ held:

> *"…in so far as the right of permanent residence provided for in Article 16 of Directive 2004/38 may only be acquired from 30 April 2006, the taking into account of periods of residence completed before that date does not give retroactive effect to Article 16 of Directive 2004/38, but simply gives present effect to situations which arose before the date of transposition of that directive."*

The ECJ also stated, at para. 49, that "*in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part*" and that "*account must be taken of the reasons which led to its adoption"*. The applicant submits that while not on all fours with his circumstances, the *Lassal* case is instructive, particularly where a determination on his leave to remain application only issued in 2011. I am not persuaded by the applicant's argument that the decision in *Lassal* is persuasive authority for the case being made in these proceedings. The fundamental difference between the applicant's position and what was under consideration in *Lassal* is that the applicant has not fallen between the old system and the new system, unlike the situation which presented in *Lassal*. The applicant had a determination on his protection claim in 2005.

64. It is a fundamental principle of EU law that legislation applies prospectively (*Stato v. Srl Meridionale* 1981 E.C.R. 2735 refers).

In *Stato*, the ECJ stated:

> *"Although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, this is not the case with substantive rules. On the contrary, the latter are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them.*
>
> *This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of community legislation must be clear and predictable for those who are subject to it. The Court has repeatedly emphasized the importance of those principles, in particular in the judgments of 25 January 1979 in Case 98/78 Racke v. HauptZollmat Mainz…and Case 99/78 Decker v. Hauptzollmat Landau…in which it stated that in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication and that it may be otherwise only exceptionally, where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."*

64. The aforesaid approach was adopted by the ECJ in Case C-256/07 *Mitsui v. Hauptzollmat Dusseldorf* (2009) E.C.R. 1-1951.

65. Accordingly, while the applicant argues that there is nothing in Article 18 of the Qualification Directive to imply that it should not be applied retrospectively, that is not a test under EU law, as is clear from the jurisprudence of the ECJ. I am satisfied that there is nothing in the Directive which admits of a retrospective application to a person in respect of whom the salient protection decision was made pre-10th October, 2006. It is also my view that the very fact that the Qualification Directive provided for a lengthy period of implementation by Member States gives credence to the respondents' submission that the measures provided for in the Directive were intended to be implemented prospectively.

66. Insofar as in this case the applicant relies on the principle of effectiveness, and in so doing relies on *H.N.* and *Danqua*, it seems to me also that neither the principle itself nor the case law relied on can assist the applicant. Firstly, the object of the principle of effectiveness is to remove procedural obstacles to persons seeking to avail of rights. As the applicant is not a person to whom the Directive applies, he has no substantive right in respect of which the principle of effectiveness comes into play. Moreover, in both *H.N.* and *Danqua*, the respective applicants were coming into the asylum system for the first time and both applications were post-October, 2006. Accordingly, their respective circumstances fell to be considered in the legal landscape post-10th October, 2006 and both were accordingly entitled to rely on the principle of effectiveness as a matter of EU law when arguing their respective cases on the issue of subsidiary protection.

67. While the old 2006 Regulations and the 2013 Regulations, as amended preclude the applicant from applying for subsidiary protection, and while the Court has found that the Qualification Directive has not conferred on him the right to apply for subsidiary protection, he nevertheless retains his existing protections under international law, as expressed in national legislation by virtue of s. 5 of the 1996 Act, s.3 of the 1999 Act, s. 4 of the 2000 Act and s.3 of the 2003 Act. Accordingly, it cannot be argued that he has lost his opportunity to be protected. Thus, insofar as the applicant raises the spectre of his being removed from the State in the future, he has available to him the protections entrenched in the 1996, 1999, 2000 and 2003 Acts.

68. In the course of the within proceedings, the applicant submitted that if the Court did not agree with the applicant's principal submission that the import of the Qualification Directive is to confer on the applicant a right to be considered for a grant of subsidiary protection, the Court should make a reference to the ECJ for a preliminary ruling. The respondents disagree that a reference is warranted since the right asserted by the applicant does not arise from the Qualification Directive or from any other source of law. I am inclined to agree with the respondents' position. Given that the Court is satisfied that the Qualification Directive has no applicability to the applicant's circumstances, the Court finds no basis upon which to seek the guidance of the ECJ.

69. In light of the findings which the Court has made, I do not deem it necessary to consider the arguments raised by the respondents as to the nine year delay on the part of the applicant in seeking subsidiary protection.

70. For the reasons set out herein, the reliefs sought by the applicant are denied.