Neutral Citation: [2015] IEHC 146

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 211 JR]

BETWEEN

M. B.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 6th day of March 2015

1. This is a telescoped application for judicial review challenging certain aspects of the European Union (Subsidiary Protection) Regulations 2013 ('the 2013 Regulations'). In particular, the applicant seeks declarations that the 2013 Regulations are *ultra vires* s. 3 of the European Communities Act 1972 and are thereby repugnant to Art. 15.2.1 of the Constitution and / or that they are repugnant to Art. 40.3 of the Constitution and Articles 6 and 13 of the European Convention on Human Rights. The applicant also seeks an order of *certiorari* in respect of the report and recommendation of Mr. Donal Horgan and further, a declaration that the Refugee Applications Commissioner is not permitted to delegate the function of making a recommendation in respect of an application for subsidiary protection pursuant to the 2013 Regulations. These latter reliefs were sought by way of amended pleadings by the applicant during the course of proceedings following a query raised by the court.

Background:
2. The applicant is a Bangladeshi citizen who was born in 1983 and came to Ireland on the 22nd January 2009. He made an application for asylum on 29th January 2009 and received a negative recommendation from the Office of the Refugee Applications Commissioner ("ORAC") on 15th May 2009. Negative credibility findings were made by ORAC. The applicant appealed this negative decision to the Refugee Appeals Tribunal but was unsuccessful in his appeal. The applicant received a 'three options' letter from the Minister on 30th March 2010 and the applicant duly made an application for subsidiary protection and leave to remain on 20th April 2010.

3. The applicant avers that during his time in the State he has met and fallen in love with a British-born national with dual citizenship of the United Kingdom and Ireland. The applicant states that he married her on the 30th September 2013 and as his wife is an EU citizen exercising her EU Treaty rights he was given permission to be in the State while his formal application for residency based on his wife's status is processed.

4. On 20th November 2013, the Minister wrote to the applicant informing him of a new procedure for subsidiary protection applications under the 2013 Regulations. The applicant's solicitors wrote to the Refugee Applications Commissioner and the Irish Naturalisation and Immigration Service ('INIS') highlighting concerns about the 2013 Regulations. Nonetheless, the applicant received a letter inviting him to interview at ORAC on the 11th April 2014. The applicant's solicitors replied to that letter outlining his objection to the Refugee Applications Commissioner hearing the application for subsidiary protection and gave notice of their instructions to issue judicial review proceedings. Following further correspondence in which the applicant sought the postponement of the oral hearing, he attended the oral hearing at ORAC stating that it was "under protest and without prejudice to the High Court proceedings". A report was duly compiled by Ms. Aideen Pendred dated 30th May 2014 following her interview of the applicant. A negative recommendation in respect of the application for subsidiary protection then issued from ORAC signed by Mr. Donal Horgan 'For the Refugee Applications Commissioner' and dated 27th June 2014.

Applicant's Submissions:
5. The applicant complains that because the Refugee Applications Commissioner has made a negative first instance recommendation on his asylum application, his involvement as the decision maker in the application for subsidiary protection is in breach of the principle of *nemo iudex in causa sua*. I understood this complaint to be that the determination of his application for subsidiary protection infringed the rule against bias.

6. Counsel notes that as the 2013 Regulations were made under s. 3 of the European Communities Act 1972 the applicant's challenge relies on the dicta of Finlay C.J. in *Meagher v. Minister for Agriculture and Food* [1994] 1 I.R. 329 who said:

> "That principle is that it must be implied that the making of regulations by the Minister, as is permitted by the section, is intended by the Oireachtas to be conducted in accordance with the principles of constitutional justice, and therefore that it is to be implied that the Minister shall not in exercising the power of making regulations pursuant to the section, contravene any provisions of the Constitution. If therefore in such an instance challenge were to be made to the validity of a ministerial regulation having regard to the absence of necessity for it to be carried out by regulation instead of legislation and having regard to the nature of the content of such regulation it would have to be a challenge made on the basis that the regulation was invalid as *ultra vires* being an unconstitutional exercise by the Minister of the power constitutionally conferred upon him by the section."

7. The applicant claims that an analysis of fair procedures and constitutional justice encompasses an examination, not only of Art. 40.3.1 of the Constitution but also Articles 41 and 47 of the EU Charter of Fundamental Rights and Articles 6 and 13 of the European Convention on Human Rights. In particular, the applicant in his submissions on constitutional justice contends that:

> • The Commissioner has already decided that the applicant is not credible in the context of his failed application for asylum;

• The Commissioner advocated in favour of his own negative decision on the applicant's asylum application before the Refugee Appeals Tribunal.

8. In submitting that the Commissioner is *persona designata* in the processing of applications, the applicant points to Regulations 5 and 6 of the 2013 Regulations which state:

> "5. (1) The Commissioner, on receipt of an application, shall—
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> (a) without delay, give or cause to be given to the applicant a statement referred to in paragraph (2), and
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> (b) investigate, in accordance with this Regulation, the application for the purpose of ascertaining whether the applicant is a person in respect of whom a subsidiary protection declaration should be given and making a recommendation under Regulation 6 in relation to the application."
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> …
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> 6. (1) Where an investigation is carried out under Regulation 5, the Commissioner shall, as soon as practicable, prepare a written report in which he or she shall—
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> (a) refer to the matters relevant to the application raised by the applicant in the interview under Regulation 5,
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> (b) refer to such other matters as he or she considers appropriate,
>
> (c) set out his or her findings in relation to the application, and
>
> (d) set out his or her recommendation in relation to the application."

9. Counsel states that the Commissioner is clearly *persona designata* under the 2013 Regulations in recommending whether or not subsidiary protection is granted to an applicant. While it is conceded that the Commissioner can have regard to the views of the interviewers, it is submitted that he cannot be directed by them on what to decide. The applicant refers to *McLoughlin v. Minister for Social Welfare* [1958] I.R. 1, *State (Rajan) v. Minister for Industry and Commerce* [1988] I.L.R.M. 231 and *Dunne v. Donohoe* [2002] 2 I.R. 533 on the inability of a *persona designata* to abdicate their discretion in this regard.

10. It is contended that the applicant applied to the Commissioner for asylum who found that the applicant's narrative was not credible. In refusing to make a positive recommendation the Commissioner referred to the provisions of paragraph 203 and 204 of the UN Handbook with regard to the application of 'the benefit of the doubt' where a decision maker is satisfied as to an applicant's general credibility and stated in his s. 13 report that: "It is therefore considered reasonable to conclude that the benefit of the doubt cannot be afforded to this applicant, therefore this applicant has not demonstrated a well founded fear of persecution in Bangladesh." The applicant contends that, in effect, the Commissioner was not satisfied as to the applicant's general credibility. It is submitted that such an adverse finding in respect of the applicant by the Commissioner is a bar to his subsequent processing of the applicant's application for subsidiary protection. Permitting him to process such subsequent application offends the principle of *nemo iudex in causa sua*, it is said. The applicant here relies on the decision of Kelly J. in *Prendiville v. The Medical Council* [2008] 3 I.R. 122.

11. The applicant also raises complaint that the Commissioner, by appearing before the Refugee Appeals Tribunal, takes on an advocacy role and, while his function is not to defeat the appeal, he nonetheless presents a case and acts as a *legitimus contradictor* to the appeal. It is submitted that a person who takes an advocacy role against a person cannot make a decision on that person's case at a subsequent stage in the international protection process. Counsel refers to *Flanagan v. University College Dublin* [1988] I.R. 724 and *Heneghan v. Western Regional Fisheries Board* [1986] I.L.R.M. 225 in this regard.

12. The applicant refers to *Heneghan* (supra) wherein it was said that a person had acted as "witness, Prosecutor, Judge, Jury and Appeal Court" and submits that while the Commissioner is not the appellate body under the 2013 Regulations, he has been the judge, jury (in the s. 13 process) and prosecutor (before the Tribunal) in respect of the applicant's asylum claim. Counsel states that by virtue of Art. 6 of the European Convention on Human Rights, a person is guaranteed an "independent and impartial tribunal", but that such right is breached by the system established under the 2013 Regulations.

13. The applicant submits that if the regime pursuant to the 2013 Regulations breaches domestic law as to fair procedures and constitutional justice, then the 2013 Regulations are *ultra vires* s. 3(2) of the European Communities Act 1972. Counsel also submits that the 2013 Regulations are in breach of Article 41 of the EU Charter of Fundamental Rights which guarantees the right to good administration, encompassing a duty to act impartially while implementing EU law. Article 47 of the Charter also guarantees the right to an "independent and impartial tribunal". In this regard, counsel refers to the decision of Court of Justice in *H.N. v. Ireland* (Case C-604/12, 8th May 2014) wherein the court stated:

> "52. As regards, in particular, the requirement for impartiality, that requirement encompasses, inter alia, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the national authorities concerned (see, by analogy, Case C-439/11P *Ziegler v. Commission*)"

14. Counsel notes that in *Ziegler v. Commission*, the court stated:

> "155. Article 51 of the Charter provides that every person has the right, inter alia, to have his or her affairs handled impartially by the institutions of the European Union. That requirement of impartiality encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned."

15. The applicant concedes that the Court of Justice found in *H.N. v. Ireland* that the previous subsidiary protection regime was "not at odds with the requirement of impartiality pertaining to the right to good administration." However, counsel notes that the decision in *H.N.* requires that an application for subsidiary protection can be made at the same time as an application for asylum, but is silent as to whether the one person may make the two decisions. The applicant submits that a regime in which the body that finds against an asylum seeker, then takes on the role of advocate and defends its findings at an appeals tribunal before sitting again as the decision maker in the subsidiary protection application would be in breach of the principles of European law.

16. The applicant has also pleaded that in so far as the 2013 Regulations permit the Commissioner to delegate his functions to his staff, such provision is invalid as it is achieved by unlawful use of s.3 of the European Communities Act 1972 which permits laws to be adopted by statutory instrument made by a Minister rather than by legislation made by the Oireachtas.

Respondent's submissions:
17. The respondent states that it is common case that the Commissioner is *persona designata* in relation to subsidiary protection applications under the 2013 Regulations. However, counsel notes that under both s 6(2) of the Refugee Act 1996 and Reg. 27(1) of the 2013 Regulations, the independence of the Commissioner in the exercise of his functions is set out. The respondent submits that the applicant has failed to provide any evidence that the Commissioner has been or can be directed by any other body or authority as to what recommendation to make in respect of an application for subsidiary protection. The respondent notes that Reg. 30(2) specifically prohibits the Commissioner from delegating to members of the panel the function set out at Reg. 6(1)(d) of the 2013 Regulations that the Commissioner shall "set out his or her recommendation in relation to the [subsidiary protection] application".

18. It is submitted that the applicant has not shown that the Commissioner has delegated his decision making function under Reg. 6(1)(d) in contravention of Reg. 30(2) of the 2013 Regulations to those panel members who compile the subsidiary protection reports. Rather, counsel points to the Contract for Services between the Commissioner and Members of the Case Processing Panel Pursuant to Regulation 30 which describes the role of panel membership and notes that Clause 15 of the Contract provides "A final recommendation in all cases shall be made by officers of the ORAC".

19. The respondent contends that it is a trite argument to say that the Commissioner has already decided that the applicant is not credible. It is submitted that the role of making of a recommendation on subsidiary protection is not an appeal against the recommendation to refuse a declaration of refugee status. Rather, it is a new jurisdiction conferred on the Commissioner to be carried out impartially in accordance with natural and constitutional justice. It is noted that the test applied in assessing whether an applicant is eligible for subsidiary protection is different to that applied in an assessment of refugee status. Counsel submits that merely because the context of the application may be similar or the same, it does not detract from the obligation placed on the decision-maker to engage in a separate consideration of the application as required by the Court of Justice in *M.M. v. Minister for Justice* (Case C-277/11 [2012 ECR-0000).

20. The respondent asserts that it is difficult to reconcile the view taken by the applicant with the provisions of the Qualification Directive and the Procedures Directive as the latter provides that the same decision maker is entitled to decide both applications. Counsel notes that the right to apply for subsidiary protection is not divorced from the right to apply for asylum but is a complementary right or status which the Procedures Directive (which is not applicable in Ireland with respect to subsidiary protection matters) envisages will be decided at the same time or one after the other by the same decision maker. The respondent submits that the applicant's argument that Irish constitutional law precludes the Commissioner from deciding applications for a status previously unknown in Irish law until its introduction by the Qualification Directive is untenable particularly in light of the fact that the Procedures Directive expressly provides for both a unified and bifurcated process.

21. The respondent contends that the findings of the Refugee Appeals Tribunal in the applicant's asylum claim were different in part and with a different emphasis to those made by the Commissioner. However, the respondent notes that the applicant appears to argue that the Commissioner will be unable not to follow his own earlier credibility findings made in the context of the asylum application. Counsel submits that the same principle must logically apply to the Tribunal but curiously that the applicant does not make the argument that the principles of constitutional justice preclude the Tribunal from hearing an appeal on subsidiary protection even though it has already made credibility findings in relation to the applicant. In any event, the respondent notes that Reg. 11 of the 2013 Regulations legally requires the Commissioner to consider the issue of credibility afresh in the context of an entirely new application.

22. It is submitted that it is clear from the training regime (and the training manuals provided to members of the independent panel) that a panel member acting on behalf of the Commissioner will have the role of independently assessing an applicant's credibility notwithstanding any earlier adverse credibility findings. The respondent notes that in training sessions for panel members it was also emphasised that fair procedures necessitated that earlier findings be put to an applicant and that any comments made or explanations given in that regard had to be weighed in the balance in the compiling of the report. Such procedure was to be followed in light of the decision of Hogan J. in *M.M. v. Minister for Justice* [2013] IEHC 9.

23. Counsel also highlights that internal instructions have been issued by the Commissioner to ensure that where Higher Executive Officer Team Leaders have had any decision making function or input at an earlier stage of the protection process, those persons cannot be involved with the subsidiary protection application concerned. It is submitted that this approach ensures against a similar scenario to that which occurred in *Prendiville v. The Medical Council* [2008] 3 I.R. 122 recurring.

24. The respondent re-iterates that the role of the Commissioner in appearing before the Tribunal is that of *legitimus contradictor* and refers to the dicta of Cooke J. in *T.T.A. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 215:

> "The Commissioner acts as a type of *legitimus contradictor* who provides the adversarial element which permits the Tribunal to test and tease out the issues, but this in no way inhibits the Tribunal in reaching a conclusion that the Commissioner has made mistakes; that he has relied on wrong or inadequate evidence; that he has misunderstood the applicant, or in deciding in the light of entirely new evidence submitted by the applicant that conclusions which might have been tenable before the Commissioner should, on balance, no longer be allowed, and that a new view of the case should be taken."

25. Similarly, the respondent submits it is open to a panel member assessing the credibility of an applicant to find, having put the previous negative credibility findings to him, that the conclusions on credibility reached in the asylum process, whether by ORAC or the Refugee Appeals Tribunal were not tenable. Counsel notes that the Procedures Directive expressly contemplates that the decision maker at first instance will be one and the same for both types of international protection application and refers to Art. 3.3 of the Procedures Directive in this regard. It is contended that by making an application pursuant to the 2013 Regulations, the applicant is in a far more advantageous situation than an applicant being considered under a unified system in that he is guaranteed that his application for subsidiary protection will be examined by someone other than the person who processed his asylum application and who is obliged to carry out a separate credibility assessment.

26. The respondent submits that the applicant's contention that the 2013 Regulations are in breach of Article 6 of the ECHR misconstrue the *ratione materiae* of that particular Article. Counsel asserts that the Article is applicable to court or tribunal proceedings and not to an application at a procedural stage. In this regard, it is noted that in *Maaouia v. France* (Application No. 39652/98, 5th October 2000) the Strasbourg court held that "Decisions regarding the entry, stay and deportation of aliens do not

concern the determination of an applicant's civil rights or obligations." It is also submitted that the applicant misconstrues the substance of the right to an effective remedy pursuant to Article 13 of the ECHR. The respondent contends that the right under Art. 13 goes to the availability of an appeal or review process whereas this case is concerned with a first instance decision and as such submits that the issue does not arise in this case.

27. Counsel notes that the principle of procedural autonomy was addressed by the Court of Justice in *H.N. v. Minister for Justice, Equality and Law Reform* (Case C-604/12) in the following terms:

"Accordingly, in the absence of EU rules concerning the procedural requirements attaching to the examination of an application for subsidiary protection, the Member States remain competent, in accordance with the principle of procedural autonomy, to determine those requirements, while at the same time ensuring that fundamental rights are observed and that EU provisions on subsidiary protection are fully effective (see, to that effect, Case C-439/08 VEBIC EU:C:2010:739, paragraph 64)."

28. It is submitted that the procedures applicable to the determination of asylum claims (and subsidiary protection claims in a unified system) are governed by the Procedures Directive. In this regard, counsel notes that Art. 4(1) of the Procedures Directive requires the designation of a determining authority responsible for the examination of an asylum application (and therefore an application for subsidiary protection in a unified system) and that Annex I of the Directive states that ORAC is that body in Ireland. Similarly counsel notes that Article 32, in addressing subsequent applications for asylum, expressly contemplates the assessment of further representations "in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal" by the same determining authority.

29. With regard to alleged claims of potential bias, counsel for the respondent refers to various decisions of the Court of Justice and in particular to that in *H.I.D. and B.A. v. Refugee Applications Commissioner* (Case C-175/11). The respondent asserts that in cases where breach of fundamental principles including bias is alleged, the Court of Justice has relied on the availability of judicial supervision to answer claims. It is submitted that the Court of Justice has consistently taken the approach that where the legal system as a whole provides for the effective observance of rights guaranteed by EU law, that will be sufficient to ensure that fundamental rights (including those in Articles 41 & 47 of the EU Charter) are respected. In this regard, the respondent notes that in *H.I.D.* the court upheld the effectiveness of the Refugee Appeals Tribunal together with the availability of judicial review as sufficient to constitute an effective remedy in EU law. It is submitted that the same avenue is open to the applicant in respect of a concern over the treatment of earlier credibility findings in this case.

30. Submissions were also received from the respondent on the applicant's application to amend his pleadings to include the addition of two new reliefs on the basis of two new grounds. The respondent notes that the new grounds arose from a query by the court as to whether the Commissioner was *intra vires* his powers in delegating his function pursuant to Reg. 6(1)(d) of the 2013 Regulations.

31. It is submitted that s. 6 of the Refugee Act 1996 provides for the establishment of the Refugee Applications Commissioner. Section 6 makes reference to the provisions of the First Schedule of the Refugee Act 1996 having effect in relation to the role. In section 9 of the First Schedule to the Refugee Act 1996 (as substituted by s. 11 Immigration Act 1999) it states, "9. The Commissioner may delegate to any members of the staff of the Commissioner any of his or her functions under this Act save those conferred by section 7." Section 7 relates to the delegation of powers by the Minister to the Commissioner in respect of recruitment of staff and related matters and is not relevant for our particular purposes.

32. The respondent notes that Regulation 27 of the 2013 Regulations provides:

> "27. (1) The Commissioner shall be independent in the exercise of his or her functions under these Regulations.
>
> (2) A reference in section 7 of the Act of 1996 to the activities of the Commissioner shall include a reference to the activities of the Commissioner under these Regulations.
>
> (3) Subject to paragraph (4), a reference in the First Schedule to the Act of 1996 to the functions of the Commissioner (including a reference to the functions of the Commissioner conferred by that Act) shall be deemed to include a reference to the functions conferred on the Commissioner by these Regulations.
>
> (4) Paragraph (3) shall not apply to the function of the Commissioner specified in paragraph 11 of the First Schedule to the Act of 1996.
>
> (5) Subject to the need for fairness and efficiency in dealing with applications under these Regulations, the Commissioner may, where he or she considers it necessary or expedient to do so, accord priority to certain classes of applications determined by reference to one or more of the following matters:
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> (a) the grounds of applications;
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> (b) the country of origin or habitual residence of applicants;
>
> (c) any family relationship between applicants;
>
> (d) the ages of applicants and, in particular, of persons under the age of 18 years in respect of whom applications are made;
>
> (e) the dates on which applications were made;
>
> (f) the likelihood that the applications are well-founded."

33. Counsel also notes the provisions of Reg. 30 in relation to contracts for services, which states:

> "30. (1) The Minister may enter into contracts for services with such and so many persons as he or she considers necessary to assist the Commissioner in the performance of his or her functions under these Regulations and such contracts with such persons shall contain such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, determine.
>
> (2) The Commissioner may delegate to a person who has entered into a contract with the Minister referred to in

paragraph (1) any of the Commissioner's functions (other than the function referred to in Regulation 6(1)(d)) under these Regulations."

34. Counsel submits that Reg. 27(3) coupled with Reg. 30(2) provide the ambit within which the Commissioner may effectively delegate his functions. In this regard, counsel asserts that Reg. 30(2) is a narrow prohibition on delegation and merely prohibits the Commissioner from delegating his function pursuant to Reg. 6(1)(d), to "set out his or her recommendation in relation to the application", to members of the Case Processing Panel who are not civil servants or members of the Commissioner's staff. It is submitted that therefore the Commissioner does have a statutory power to delegate his functions to members of his staff and was *intra vires* his powers in delegating his function under Reg. 6(1)(d) to Mr. Horgan.

35. The respondent submits that in any event, the Commissioner has powers of delegation under the well-known *Carltona Doctrine* as the principle was accepted in Ireland by the Supreme Court in *Devanney v. Shields* [1998] 1 I.R. 230. Counsel also refers to the decisions in *Commissioners of Customs & Excise v. Cure & Deeley Ltd* [1962] 1 Q.B. 340, *R. (On the application of the Chief Constable of the West Midlands Police) v. Gonzales & ors* [2002] EWHC 1087 and *Murray t/a Tom Murray Garden Machinery v. Revenue Commissioners* [2012] IEHC 53 in this regard. As such, it is contended that in a parallel fashion to Government Ministers, the Commissioner has responsibility for the acts of his officials. The respondent submits that the Commissioner is free to make the recommendation pursuant to Reg. 6(1)(d) himself, but his responsible officials are free to take such decisions in his name, except where this is negative by legislation or general law and that is not the case in these proceedings.

Findings:

Bias / Nemo iudex in causa sua: Alleged Breach of EU Law

36. In my view, the applicant's EU law complaint arising from the prior involvement of the Office of the Refugee Applications Commissioner in the applicant's asylum application is unfounded. No rule of European law requires separate persons to assess applications for asylum and subsidiary protection. EU law requires Member States to permit persons to make a single application for both forms of protection. It is a precondition set by EU law that a person may only be considered for subsidiary protection where it has been decided that the person is ineligible for asylum. In other words, the existence of a negative decision on asylum is integral to any assessment of subsidiary protection. The decision maker in respect of subsidiary protection is automatically aware that the applicant for this subsidiary protection is a failed asylum seeker. Recital 24 of the Qualification Directive and case law has clearly established that subsidiary protection is a complementary form of protection to asylum. It is not a separate, unrelated concept. It is bound up with and dependent upon the result of an asylum application.

37. The Court is greatly aided in deciding this matter by reference to the dicta of Cooke J in *V.J. [Moldova] v. Minister for Justice* [2012] IEHC 337. The case relates to the former regime in which the Minster for Justice was the decision maker in applications for subsidiary protection as well as being the ultimate decision maker for asylum applications. In *V.J.*, a failed claim for subsidiary protection based on the same facts and events as that presented in a failed asylum claim was challenged as being tainted by bias and prejudgement because of the prior involvement of the Minister in rejecting the applicant's asylum claim. Rejecting this complaint Cooke J. said:

> "22. The Court is also satisfied that no arguable case is presented by ground No. 4, which alleges that the subsidiary protection decision is tainted by objective bias and prejudgment. As this Court has pointed out in a number of judgments, subsidiary protection as introduced by the Qualifications Directive is a form of international protection created by the European Union to complement the protection afforded by refugee status under the Refugee Convention of 1951. It provides an additional form of protection where an individual demonstrates the existence of a genuine risk of facing serious harm if repatriated in a case where the source or cause of the harm does not fall within the scope of the definition of "persecution" under the Convention. As is well known, in all Member States save this one a single procedure has been implemented for the examination of applications for international protection in which a single application is made for both forms of protection and, where an applicant is not qualified as a refugee, the same decision-maker proceeds immediately to consider whether on the application as presented and the facts found, the applicant nevertheless qualifies for subsidiary protection. There is, accordingly, no incompatibility and no question of bias or prejudgment by virtue of the fact that the Minister makes the assessment required as to eligibility for subsidiary protection after he has accepted the negative recommendation of the asylum decision maker by the refusal of the declaration under s. 17(1) of the Act of 1996."

38. If in *V.J.* there was no incompatibility caused by Minister taking both asylum and subsidiary protections decisions, then similarly, no illegality arises because of the dual role of the ORAC of which complaint is made in these proceedings.

39. The Procedures Directive and Qualification Directive expressly contemplate that the same decision maker may take both asylum and subsidiary protection decisions even though the subsidiary protection decision must, as a matter of law, follow a negative asylum decision. This is so because Article 2(e) of the Qualification Directive (2004/83/EC) defines a 'person eligible for subsidiary protection' as "a third country national or stateless person who does not qualify as a refugee".

40. Much of what Cooke J. had to say about the complementarity between asylum and subsidiary protection was reflected in the judgement of the CJEU in (C-604/12) *H.N. v. Minister for Justice Equality and Law Reform*, two years after the decision in *V.J. [Moldova]*. The Irish Supreme Court had referred a question which essentially asked whether Ireland was required to permit autonomous applications for subsidiary protection.

41. The ECJ said:

> "29 Article 2(e) of Directive 2004/83 defines persons eligible for subsidiary protection as third country nationals or stateless persons 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 and through such persons being offered an appropriate status (Case C 285/12 Diakite EU:C:2014:39, paragraph 33).
>
> 32 It is clear from the above that the subsidiary protection provided by Directive 2004/83 is complementary and additional

to the protection of refugees enshrined in the Geneva Convention.

33 That interpretation is also consistent with the objectives laid down by Article 78(2)(a) and (b) TFEU, which provide that the European Parliament and the Council of the European Union are to adopt measures for a common European asylum system comprising, inter alia, 'a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'.

34 Furthermore, as the Advocate General observed at points 46 and 49 of his Opinion, given that a person seeking international protection is not necessarily in a position to ascertain the kind of protection applicable to their application and that refugee status offers greater protection than that conferred by subsidiary protection, it is, in principle, for the competent authorities to determine the status that is most appropriate to the applicant's situation.

35 It is apparent from the foregoing considerations that an application for subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status.

36 It follows that Directive 2004/83 does not preclude national legislation which provides that the requirements for granting refugee status must be considered before those relating to subsidiary protection."

42. In addition the ECJ expressly addressed whether unlawful bias might taint the process because of prior decisions. The court said:

"In that regard, as is apparent from the considerations set out in paragraphs 29 to 35 above, the simple fact that an application for subsidiary protection may be considered only after a decision refusing refugee status has been given is not, in principle, likely to compromise the ability of applicants for subsidiary protection actually to avail themselves of the rights conferred on them by Directive 2004/83.

44 Nevertheless, the effect of legislation such as that at issue in the main proceedings is that a third country national seeking only subsidiary protection will necessarily be required to follow two separate procedural stages, while the introduction of a two-stage procedure for obtaining international protection risks extending the duration of the procedure and, accordingly, delaying the determination of the application for subsidiary protection.

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

46 Account must be taken of both of the duration of the examination of the application for refugee status culminating in the refusal of the application and the duration of the examination of the application for subsidiary protection.

47 It should also be noted that, where a third country national submits an application for international protection which discloses nothing to support the conclusion that that person has a well-founded fear of being persecuted, it is for the competent authority to establish, within a reasonable time period, that the person in question does not qualify for refugee status, so that the examination of the application for subsidiary protection may be considered in good time.

48 It is open to the authorities responsible for considering applications for international protection, inter alia, to accelerate the procedure for examining the requirements for granting refugee status, in accordance with Article 23(4) of Directive 2005/85, where the applicant clearly does not qualify as a 'refugee' within the meaning of Article 2(c) of Directive 2004/83.

49 As regards the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law.

50 Accordingly, where, in the main proceedings, a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure for granting subsidiary protection, such as the procedure in question in the main proceedings, which is conducted by the competent national authorities.

51 It is therefore necessary to ascertain whether the right to good administration precludes a Member State from including in its national law a procedural rule to the effect that an application for subsidiary protection must be covered by a separate procedure and can be made only after an asylum application has been refused.

52 As regards, in particular, the requirement for impartiality, that requirement encompasses, inter alia, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the national authorities concerned (see, by analogy, Case C‑439/11 P Ziegler v Commission EU:C:2013:513, paragraph 155).

53 It should be noted, first of all, that in circumstances such as those in the main proceedings, the fact that, before commencing the examination of an application for subsidiary protection, the national authorities inform the applicant that they are considering making a deportation order cannot, of itself, be construed as a lack of objective impartiality on the part of those authorities.

54 It is in fact common ground that the reason for that disclosure on the part of the competent authorities is that it has been found that the third country national does not qualify for refugee status. That finding does not, therefore, mean that the competent authorities have already adopted a position on whether that third country national satisfies the requirements for being granted subsidiary protection. [emphasis added]

55 Accordingly, the procedural rule at issue in the main proceedings is not at odds with the requirement of impartiality pertaining to the right to good administration."

43. It is clear that the CJEU expressly considered the connection between decision making for asylum and subsidiary protection applications and found that notwithstanding an earlier negative finding on asylum, it did not mean that the authorities had thereby decided the outcome of the subsidiary protection application. The judgment must be read in the light of the fact the CJEU was aware

that the decision maker on both applications was the same office holder.

44. I am fortified in the views I have expressed on the connectedness between the forms of international protection defined in EU law by the provisions of the Qualification Directive. I refer to Recital (24) which provides: "Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention."

45. I also note that the Directive consistently refers to 'application for international protection' in the singular and never in the plural form. For example Article 2(g) provides that "'application for international protection' means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;". I also note that this language refers to "a request" for international protection.

46. Article 4 of the Qualification Directive is also relevant to this theme. It provides:

> "Assessment of facts and circumstances
>
> 1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application. [emphasis added]

47. As seen, Article 2 of the Directive defines application for international protection as embracing asylum and subsidiary protection. Here, in Article 4, a single application for the forms of protection is regulated.

48. Article 4 further provides:

> "3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
>
> (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;
>
> (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
>
> (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;" [emphasis added]

49. Again the underlined text strongly suggests a unified process for considering applications for international protection. That the Irish rules require separate forms and a separate assessment of the stages of international protection does not divorce these stages such that there can be no commonality in decision making *inter se*.

50. I reject the argument that the involvement of a representative of the Commissioner as a *legitimus contradictor* during the asylum appeal process alters the balance in any way. As EU law expressly permits the same decision maker to take both decisions, then the role played by the Commissioner in asylum appeals is legally irrelevant to the alleged bias or prejudgment which is said to arise from the duality. The role played by the Commissioner at the Refugee Appeals Tribunal is not an entrenchment of the decision taken at first instance.

51. In finding that EU law expressly permits a single decision maker to decide both applications I reject the ground which pleaded that such duality "conflicts with the policy of the European Union that a decision on eligibility for subsidiary protection should be taken by an independent and impartial person".

Dual Role allegedly violates Irish Law

52. The applicant advances an alternative domestic law argument about bias which allegedly arises from the duality in decision making. His counsel say even if this is permitted by EU law, it is prohibited by the Constitution. If this is so then in accordance with the decisions of the Supreme Court in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 and *Maher v. Minister for Agriculture* [2001] 2 I.R. 139, the Minister was not entitled to use the European Communities Act 1972 to make the 2013 Regulations.

53. The flaw in the applicant's argument is that it perceives applications for subsidiary protection and asylum applications as separate matters requiring separate treatment. It is the same flaw which undermined the EU law argument which I have just dismissed.

54. The essence of an application for subsidiary protection is that it can only be presented by a person who does not qualify as a refugee. There is no entitlement to present an autonomous application for subsidiary protection. It must follow a negative decision on asylum. It is not permissible for an applicant for subsidiary protection to declare himself or herself ineligible for refugee status but eligible for subsidiary protection. The question as to eligibility for asylum is quintessentially a matter for sovereign states. The complementarity of the two forms of protection requires decision makers to know that subsidiary protection applicants do not qualify for refugee status. As a matter of EU law, as I have just explained, no bias issues arise where the same decision maker takes both decisions sequentially.

55. It is true to say that the 2013 Regulations require the Commissioner to decide subsidiary protection applications having previously decided the asylum application. The question for the court is whether Irish law prohibits the same decision maker to be involved in both processes. It is well known that Ireland intends to introduce a single application procedure for both subsidiary protection and asylum, as every other EU Member State has done. Clearly such a unified procedure fully complies with EU law. The Supreme Court has mentioned the merits of a unified system. In *Okunade v. Minister for Justice* [2012] IESC 49 Clarke J said:

> "6. A Suggested Structure
>
> 6.1 I am mindful of the fact that some of the issues which arise in relation to the appropriate statutory structure for the consideration of immigration matters (including judicial review of decisions made in that process) involve policy questions which are properly within the constitutional remit of the Oireachtas. However, I am also mindful of the fact that whatever

> statutory structure is put in place can have (as recent experience has, unfortunately, demonstrated) a very real impact on the courts using up, as it does, a significant amount of court time and giving rise to circumstances where, for the reasons already analysed, it seems to me that the amount of court resources that have to be allocated is significantly increased by reason of the anomalies in that statutory structure which have already been addressed.
>
> 6.2 It does not seem appropriate for me to comment on the precise way in which applications for refugee status, subsidiary protection or any other form of permission to remain in Ireland in like circumstances should be determined. That structure is a matter for the Oireachtas. I do, however, feel that it is appropriate to emphasise the desirability of there being a single and coherent structure within which all relevant decisions are made as a result of a single process. If that is not done then experience has shown that there is a real risk that there will be multiple challenges at different stages of the same process leading not only to a significant increase in the amount of court time that needs to be devoted to same but also adding, in many cases, to the complexity of such challenges and, in addition, significantly lengthening the overall process. The length of the process brings its own problems arising from the fact that persons engaged in the process will, therefore, remain in Ireland for a lengthy period pending the completion of that process. While it would be wrong to assume that a single process will eliminate those problems it would, in my view, significantly alleviate them."

56. My view is that rules which permit the same decision maker for asylum and subsidiary protection do not offend the rule against bias because the forms of protections and their associated application procedures are intertwined and interdependent. In saying this, I bear in mind that the Qualification Directive speaks of 'an application for international protection' which may be granted on the basis of meeting the Geneva Convention rules or on the basis of a fear of serious harm as defined in Article 15 of that Directive. This is reflected in the decision of the CJEU in *H.N.* where the court said of Ireland's bifurcated system : "44 Nevertheless, the effect of legislation such as that at issue in the main proceedings is that a third country national seeking only subsidiary protection will necessarily be required to follow two separate procedural stages, while the introduction of a two-stage procedure for obtaining international protection risks extending the duration of the procedure and, accordingly, delaying the determination of the application for subsidiary protection." The ECJ in this passage clearly regard Ireland's bifurcated system as a two stage procedure for obtaining international protection, which is referred to in EU law as a unitary concept.

57. The complementarity between the protections is similar to any administrative scheme which offers a hierarchy of results. Such schemes posit that where certain circumstances exist, a variety of solutions may result. For example, a scheme to assist elderly persons might offer residential care or assistance in the home. Once basic facts concerning the person's needs are established, a decision maker could be entitled to conclude that residential care is not required but that home care might be considered. On the applicant's case, a scheme like this would fail if the same decision maker could decide on both options. If the applicant's case is correct a different official would need to consider whether home care is appropriate, following a negative decision on residential care. I cannot agree that such consequences follow from the rule against bias.

58. I see no constitutional difficulty with administrative schemes which provide cascading solutions to problems and it is permissible for single decision makers to establish the facts and then rule in or rule out a suite of solutions which might suit. I regard the consideration by decision maakers of applications for international protection in the same way.

What is the rule against bias or prejudgment in Irish law?

59. To assess the applicant's complaint as to bias, the parameters of that rule in Irish law should be considered. When Geoghegan J. in *Orange Limited v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159 reviewed the common law rules, he identified three categories of bias and it appears that the instant proceedings relate to the third category. He said as follows:

> "What the authorities seem to have established is that there are in effect three different situations where bias might arise.
>
> (1)…
>
> (2)…
>
> (3) Even in cases where there is no evidence of actual bias and no evidence of the adjudicator having any proprietary or other interest in the outcome of the matter, there will still be held to be apparent bias if a reasonable person might have apprehended that there might be bias because of some particular proven circumstance external to the matters to be decided in the case such as for instance a family relationship in circumstances where objection may be taken (O'Reilly v. Cassidy [1995] 1 ILRM 306, or the judge having been involved in a different capacity in matters which were contentious in Dublin Well Woman Centre Limited v. Ireland [1995] 1 I.L.R.M. 408, or where there was evidence of prejudgment by a person adjudicating O'Neill v. Beaumont Hospital Board [1990] I.L.R.M. 419." [emphasis added]

60. The complaint in this case relates to that latter category of actual bias, as indicated in the underlined text. Geoghegan J. went on to consider a decision of the English court of appeal in *Locabail (UK) Ltd. v. Bayfield Properties* [2002] 2 WLR 870 where Lord Bingham is quoted as follows:

> "In practice, the most effective guarantee of the fundamental right recognised at the outset of this judgment is afforded not (for reasons already given) by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes there was a real danger (or possibility) of bias."

61. The applicant draws particular attention to the comments of Lord Bingham when he spoke about a problem of actual bias arising:

> "…in a case where the credibility of any individual were in issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue within an objective judicial mind; or if for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him."

62. The applicant says that the Commissioner in this case is in an analogous position to the judge described by Lord Bingham who had, in a previous case, rejected the evidence of a person such that he could not approach such a person's evidence with an open mind on a later occasion.

63. This is superficially a strong submission by the applicant. The flaw in the analogy is that here the Commissioner has not rejected the applicant's evidence in a different case. It has been rejected, to borrow the analogy, in the same case and by the same judge. As I have been at pains to establish, the assessment of asylum and subsidiary protection are so enmeshed and have such common legal roots as to be regarded as different aspects of the same procedure i.e. an application for international protection because of harm feared.

64. Irish and European Law provides protection for persons who fear harm in their country of origin. The law will protect those whose fears come within the Geneva Convention and if there is no Convention nexus, may provide protection if the fear is in respect of serious harm as defined by Article 15 of the Qualification Directive. Separate sources of protection are potentially available for a person fleeing harm. As indicated by the CJEU in *M.M. v. The Minister for Justice, Equality & Law Reform* (case C-277/11) commencing at paragraph 63:-

> "As is clear from its title, Article 4 of Directive 2004/83 [Qualification Directive] relates to the "assessment of facts and circumstances".
>
> 64 In actual fact that "assessment" takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails citing whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met."

65. Where the same facts are advanced in support of asylum and subsequently in support of an application for subsidiary protection, my view is that the existence of findings of fact on the asylum application do not constitute a pre-judgment of facts in relation to subsidiary protection. Very often - nearly always - the same facts will be placed before the Commissioner in support of subsidiary protection as were advanced in support of asylum. He or she will be asked to adjudicate again on matters previously determined. I can find no flaw or infringement of the rule against bias in this regime because the legal architecture for determining an application for international protection expressly contemplates a single decision maker for alternative solutions to a fear of harm.

66. An important part of the role of the Office of the Refugee Applications Commissioner on an application for subsidiary protection is to carry out the second part of the assessment identified by the CJEU at paragraph 64 of the judgment in *M.M. v. Minister for Justice*. That it has previously carried out the first part of this assessment does not pre-judge the outcome of an application for subsidiary protection.

67. My view is that the Commissioner would be entitled to have full regard to the findings of fact made in the context of the asylum application and to enquire whether there was any basis advanced upon which a different view of the facts might now be taken. In other words, I do not regard the findings of fact identified by the Commissioner in the asylum application as a pre-judgment of the subsidiary protection application. I regard the asylum decision as an intrinsic part of the decision making process with respect to an application for international protection and thus part of the judgment on an application for subsidiary protection. One enters the subsidiary protection stage on an application for international protection in the knowledge that a decision has already been taken as to whether particular facts are believed. In cases where there is no difference between the claim advanced for asylum and that advanced for subsidiary protection, one carries the result of the asylum stage forward to the subsidiary protection stage. Where the credibility of an applicant has been accepted the applicant would, in principle, be entitled to proceed on the basis of the accepted facts and request that the Commissioner limit the enquiry to what the ECJ (in *M.M.* at para 64 thereof, *supra*) identified as the second stage of the Article 4 assessment. An applicant for subsidiary protection proceeds in the international protection process where part of the edifice is in existence. Findings of fact have usually been made. A negative decision on the asylum application is on the record. None of this constitutes pre-judgment and all of it is a necessary part of a regime which provides two potential sources of protection for persons fleeing harm and requires such a person to seek asylum before being permitted to seek subsidiary protection.

68. An applicant for subsidiary protection is entitled to ask for a full assessment of facts in connection with a subsidiary protection application. The existence of prior negative findings is not a pre-judgment of the new application. It is the natural consequence of the connectedness between asylum applications and those for subsidiary protection. Where an applicant proceeds to the subsidiary protection stage it is practically and legally unavoidable that such findings exist and I see no legal difficulty with those findings occupying a proper place in an application for subsidiary protection. I regard such findings as part of the decision making in the multi stage international protection process in respect of which an applicant for subsidiary protection is entitled to make fresh submissions and have those matters reconsidered.

69. Therefore I reject the argument that the 2013 Regulations infringe the Irish constitutional and common law rule against bias.

70. The applicant also pleaded that the dual decision making function of the Commissioner infringed various provisions of the European Convention on Human Rights. No discrete arguments were made in support of this plea. The dual decision making function of the Commissioner neither offends EU law, nor Irish constitutional law and I cannot see what assistance is offered to the applicant by the ECHR. In any event, In accordance with the provisions of the European Convention on Human Rights Act 2003 and the decision of Irvine J. in *Pullen v Dublin City Council*, (Unreported, High Court, 28th May 2009,), I cannot entertain such complaints because none of the limited remedies under the European Convention on Human Rights Act 2003 are pleaded.

Delegation of Function

71. Regulation 5 of the 2013 regulations requires the Commissioner to investigate "in accordance with this regulation" the application for subsidiary protection. Regulation 5(3) requires the Commissioner to interview the applicant. As is apparent from Regulation 5(7) and 5(9) the interview may be conducted by somebody other than the Commissioner.

72. Regulation 6 provides that the Commissioner, following a Regulation 5 investigation, shall prepare a written report in which he or she shall "(a) refer to the matters relevant to the application…(b) refer to such other matters as he or she considers appropriate, (c) set out his or her findings in relation to the application, and (d) set out his or her recommendation in relation to the application." Regulation 6(2) provides that the 6(1)(d) recommendation must be for or against eligibility for subsidiary protection.

73. The question which arises for decision in these proceedings is whether the Commissioner is entitled to delegate the function of making the Regulation 6(1)(d) recommendation. There appears to be two relevant provisions with respect to the Commissioner's

power to delegate his or her functions.

74. The functions of the Commissioner are found in the First Schedule of the Refugee Act, 1996 (as amended). Regulation 9 of that Schedule expressly permits the Commissioner to delegate to his or her staff functions created by the 1996 Act. Clearly the only functions the Commissioner had under the 1996 Act were related to applications for asylum.

75. Regulation 27(3) of the 2013 Regulations provides that a reference in the First Schedule of the 1996 Act to the functions of the Commissioner (relating to asylum matters) "shall be deemed to include a reference to the functions conferred on the Commissioner by these regulations" relating to subsidiary protection.

76. My view is that Regulation 27(3) is to be interpreted as permitting the Commissioner to delegate his functions in respect of subsidiary protection applications in the same way in which he is entitled to delegate his functions in respect of asylum matters. The provisions of Regulation 30(2) prohibit the Commissioner from delegating his power to make positive or negative recommendations on subsidiary protection eligibility to his contract staff. The limitation on the power of delegation, taken together with the express power to delegate generally in Regulation 27(3) is to be interpreted as permitting the Commissioner to delegate his functions to his staff (other than contract staff).

77. As is apparent from the foregoing description, the 2013 Regulations alter the ambit of the 1996 Act by extending the Commissioner's functions from asylum matters to asylum and subsidiary protection matters. Amongst the alterations to the legislation achieved by statutory instrument is the extension of the power to delegate functions. The applicant argues that regulations made pursuant to the European Communities Act, 1972 could not achieve such radical results unless the result was something required to be achieved by European Union Law. The applicant argues that no provision of the European asylum rules require a power of delegation.

78. I accept, in principle, that no rule deriving from either the Qualification Directive or the Procedures Directive or any other provision of European Union law would require the Commissioner to personally decide on each application for subsidiary protection. In this regard, I note that the Court of Justice of the European Union in *H.N. v. Minister for Justice* (C-604/12) stressed the necessity for decisions on subsidiary protection applications to be considered within a reasonable period of time (see paragraphs 45-47). This necessity is derived by the Court of Justice from the principle of effectiveness of EU law. I am satisfied that such principle necessitates the creation of a power of delegation on the part of the Commissioner with respect to subsidiary protection applications. In this sense, the creation of a power of delegation arises from an obligation of EU law. If I am wrong about this, I would have no hesitation in describing the power to delegate as a matter which is incidental supplemental, or consequential upon a general power to decide such applications and thereby permitted to be created by statutory instrument in accordance with s.3(2) of the European Communities Act, 1972.

79. I refer to a similar approach adopted by this court in *B. A. and R. A. v. The Minister for Justice and Equality,* (High Court, Unreported, 12th December 2014) when dealing with an argument that the power to transfer decision making on subsidiary protection applications was ultra vires the European Communities Act, 1972. Rejecting the argument I said:

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

Possible Referral to CJEU

80. A question has been raised by the applicant for possible referral to the Court of Justice of the European Union in accordance with Article 267 TFEU. That suggested question was:

> "Whether the assignment to the Commissioner of the determination of subsidiary protection applications in circumstances where the Commissioner has already taken the first instance decision in the asylum case would breach the principle of impartiality as recognised by EU law as part of the right to good administration."

81. In view of my findings on the proper meaning of the Qualification Directive and the express provision made in EU law for unified decision making on applications for international protection, the need for a referral does not arise.

82. For all these reasons I dismiss this application for judicial review.