

**THE HIGH COURT
JUDICIAL REVIEW**

[2015 No. 440 J.R.]

BETWEEN

M. A. P.

APPLICANT

AND

THE REFUGEE APPLICATIONS COMMISSIONER, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

EX TEMPORE JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 27th day of July 2015

Introduction:

1. This is an *ex parte* application for leave to apply for judicial review seeking, inter alia, a declaration that the European Union (Subsidiary Protection) Regulations 2013 (S.I. No. 426 of 2013) fails to properly transpose the terms of Council Directive 2004/83/E.C. of 29 April, 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, O.J. L 304/12 30.9.2004 ('The Qualification Directive') into domestic law.

2. Further, the applicant applies for an order of *certiorari* to quash the decision of the first named respondent refusing to grant the applicant subsidiary protection dated the 10th June, 2015.

Background:

3. The applicant is a national of Mauritius. He arrived in Ireland in 2007. For a number of years he worked and lived in the State with a valid visa. He unsuccessfully applied for asylum in 2012. Thereafter, he made an application for subsidiary protection on the 8th April, 2013, based on his fear of a criminal gang (a private group as distinct from a state authority) he had previously worked for. The applicant claimed a fear of serious harm in Mauritius for reasons of "the death penalty or execution, or torture or inhuman or degrading treatment or punishment of a person in his or her country of origin."

4. On or about the 13th July, 2015, the applicant received a copy of the first respondent's negative determination that the applicant was not eligible for subsidiary protection status.

Submissions on the definition of torture:

5. Article 15 of the Qualification Directive falls under chapter V entitled "Qualification for Subsidiary Protection" and defines "serious harm" as consisting 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."

5. The transposing Regulations of 2013 sets out the definition of torture which is to be applied to applications for subsidiary protection as follows:-

" 'torture' has the meaning it has in section 1 (as amended by section 186 of the Criminal Justice Act 2006) of the Criminal Justice (United Nations Convention Against Torture) Act 2000;"

Section 1(1) of the Criminal Justice (United Nations Convention Against Torture) Act 2000 (as amended) defines torture as follows:-

" 'torture' means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—

- (a) for such purposes as—
 - (i) obtaining from that person, or from another person, information or a confession,
 - (ii) punishing that person for an act which the person concerned or a third person has committed or is suspected of having committed, or
 - (iii) intimidating or coercing that person or a third person,

or

- (b) for any reason that is based on any form of discrimination,

but does not include any such act that arises solely from, or is inherent in or incidental to, lawful sanctions."

Section 2 of the Act of 2000 (as amended) restricts the offence of torture to an act or omission carried out by, or at the instigation of, a public official.

6. Counsel for the applicant, Mr. O'Shea, submits that no proper transposition into domestic law of the Qualification Directive has taken place by reason of the restriction of the assessment of acts of torture to acts carried out by, or with the acquiescence of, public officials and, therefore, the respondents are precluded from refusing subsidiary protection on the basis of the purported and unlawful transposition of the directive and/or alternatively, precluded from relying on the definition of torture contained in the transposing Regulations of 2013.

The credibility of the applicant:

7. The decision maker negatively assessed the applicant's credibility in respect of his delay in applying for asylum, the level of specificity and detail he furnished regarding his involvement in the criminal gang he feared and the plausibility of his account of his role in the gang. The decision maker concluded at para. 3.2.6:-

"While each of the above issues on their own may not result in a negative credibility finding against the applicant, having weighed the evidence before me, in particular the significant delay in the applicant's asylum claim, the applicant is not being granted the benefit of the doubt and the material elements of his claim are not accepted as credible on the balance of probabilities."

8. The Court inquired as to whether the question of the correct definition of torture in the Regulations of 2013 applied to the applicant's case given the negative assessment of his credibility, because, regardless of the definition of torture included in the decision, the credibility of the applicant's evidence is not accepted by the decision maker.

9. Counsel for the applicant replied that the applicant's credibility was rejected on the standard of proof of the balance of probabilities which leaves the possibility open that those findings might be wrong and that the applicant's story might have been credible. In those circumstances, the decision maker is obliged to consider each aspect of the claim; the nationality, the credibility, the risk of serious harm or whether state protection or internal relocation would be appropriate. Mr. O'Shea further submits that in circumstances where the applicant appeals to the Refugee Appeals Tribunal, he would only be afforded one hearing in respect of the issue of the definition of torture contained in the Regulations of 2013.

Findings:

10. In respect of the first ground I find that it was premature of the applicant to seek a declaration that the Regulations of 2013 failed properly to transpose the directive on the basis of the definition of torture contained therein because the applicant's credibility was rejected by the first instance decision maker. The definition of torture in the Irish Regulations, assuming it is incorrect, is irrelevant to the decision on the applicant's claim. The applicant enjoys an unfettered right of appeal to the RAT in respect of the decision. That is the correct remedy in this case.

11. The RAT as an organ of the State is bound by the doctrine of supremacy of EU law. *Fratelli Costanzo v Comune di Milano* (Case 103/88) is authority for the proposition that organs of the state such as the RAT (and indeed ORAC) must apply EU law notwithstanding conflicting national provisions (the ECJ said " 32...administrative authorities are under the same obligation as a national court to apply the provisions of [directives] and to refrain from applying provisions of national law which conflict with them. ").

12. It is therefore open to the applicant to seek to persuade the RAT that the term 'torture' must be interpreted in accordance with the text of the Directive and if there is a conflict between the definition of torture in the Directive and in the Irish implementing regulations, the text of the Directive must prevail. If this course of action fails and a decision is made which depends on an unlawful definition of 'torture', the applicant has recourse to judicial review. If the RAT rejects credibility and rejects the appeal on this basis the issue as to the definition of torture will again be irrelevant.

13. In respect of the second matter, an application for an order of *certiorari* to quash the decision of the first named respondent refusing to grant the applicant subsidiary protection dated the 10th June, 2015, the applicant has a full appeal on every point of law and every question of fact to the R.A.T. and, therefore, I rule that this application is completely unwarranted and the matter should be pursued to the R.A.T. without any delay. If mistakes are made there, which are relevant to the applicant and which cause an injustice, there is a further remedy by way of judicial review to the High Court.