

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 594 J.R.]

BETWEEN

A.A.D. (SOMALIA)

APPLICANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of May, 2018

1. The applicant arrived in the State on 14th April, 1997. On 21st August, 2000, he was refused asylum. The fact that he was refused prior to the commencement of the qualification directive, 2004/83/EC, is an important factor in this case.
2. At the same time as the asylum refusal, the Minister made a first proposal to deport the applicant.
3. On 10th October, 2006, the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) came into force. Regulation 4(1)(a) of the 2006 regulations provides that a notification of a proposal under s. 3(3) of the Immigration Act 1999 shall include a statement that, where a person to whom s. 3(2)(f) applies (that is someone who is refused asylum), he or she may apply for subsidiary protection within a 15 day period (see para. 55 of the judgment of Fennelly J. in *Izevbekhai v. Minister for Justice, Equality and Law Reform* [2010] IESC 44 (Unreported, Supreme Court, 9th July, 2010)). This does not create a right for an applicant as such; rather it creates an obligation on the Minister to give a notice to an applicant following which the time limit for the right to apply for subsidiary protection would begin to run.
4. The applicant was granted permission to remain on 16th January, 2007, which superseded the first proposal to deport. In April, 2007, he was arrested on a charge of a possession of drugs for sale or supply. In November, 2007, he was sentenced to six years' imprisonment. In March, 2011, he received an additional one-year sentence for violent disorder while in prison.
5. In 2010, his permission to remain expired. On 21st September, 2011, a second proposal to deport was made. That was not based on s. 3(2)(f) of the 1999 Act, but rather on s. 3(2)(a) of the 1999 Act, namely that he was serving a term of imprisonment.
6. On 30th August, 2012, a deportation order was made which recited that s. 3(2)(f) (refusal of asylum) applied. That was notified on 7th September, 2012.
7. On 14th November, 2013, the 2006 regulations were revoked by the European Union (Subsidiary Protection) Regulations 2013 (S.I. No. 426 of 2013).
8. On 9th December, 2013, the applicant purportedly applied for subsidiary protection under regs. 3 and 4 of the 2006 regulations. However, those regulations had been revoked at that point.
9. In January, 2014, the applicant was released from prison. On 9th February, 2015, he requested that his alleged subsidiary protection application be processed as a matter of priority.
10. On 16th April, 2015, the Refugee Applications Commissioner stated that the application could not be accepted. That decision was not challenged. On 19th June, 2015, the applicant wrote to the Minister and the Commissioner, submitting that the subsidiary protection application should be processed.
11. On 25th June, 2015, the Minister reiterated that it could not be so processed. The Commissioner reiterated that on 2nd July, 2015.
12. On 20th October, 2016, the CJEU gave judgment in Case C-429/15 *Danqua v. Minister for Justice and Equality*. On 9th March, 2017, the deportation order was amended to add in an alias for the applicant. Again, s. 3(2)(f) of the 1999 Act was relied upon. That amended order was not challenged.
13. On 21st September, 2017, the European Union (Subsidiary Protection) Regulations 2017 (S.I. No. 409 of 2017) were made implementing the judgment in *Danqua* and allowing 30 days from 2nd October, 2017 for certain applicants to make a subsidiary protection claim. That did not include this applicant because he did not get a notice under reg. 4(1)(a) of the 2006 regulations: see reg. 3(3) of the 2013 regulations.
14. On 12th June, 2017, the applicant submitted that on the basis of *Danqua*, the application had to be accepted. On 17th June, 2017, the International Protection Office stated that it was not prepared to process the application. This fourth refusal was much the same as the previous three refusals and it is the fourth one that is now challenged. The applicant submits, in effect, that the fourth refusal restarts the clock for judicial review.
15. On 24th July, 2017, leave was granted in the present proceedings by O'Regan J.
16. Separately from the foregoing, the s. 3(11) application made on 9th December, 2013, was refused on 7th September, 2015, and a further s. 3(11) application made on 19th January, 2016, was refused on 14th March, 2017.
17. I have heard helpful submissions from Mr. Michael Lynn S.C., and Mr. Anthony Hanrahan B.L., who also addressed the court, for the applicant and from Ms. Emily Farrell B.L., for the respondents. There was also an abundance of written submissions on behalf of

the applicant dated 12th January, 2018, 29th April, 2018 and 14th May, 2018, and on behalf of the respondents dated 18th January, 2018, 30th April, 2018, and 9th May, 2018.

Reliefs Sought

18. The primary relief is an order of *certiorari* quashing the "decision" of 17th July, 2017, refusing to process the applicant's purported application for subsidiary protection. The applicant also seeks a declaration that the European Communities (Eligibility for Protection) Regulations 2006 and/or the International Protection Act 2015 failed to transpose the qualification directive, 2004/83/EC.

19. It is important to note that I am not concerned with whether the second proposal to deport was flawed for lack of a notification of the entitlement to make a subsidiary protection application or whether the deportation order thereby arrived at was flawed. If there were any flaws in such documents, they should have been subject to a challenge in accordance with s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and were not, and they cannot be impugned now.

These proceedings are a collateral attack on decisions covered by s. 5 of the 2000 Act

20. If the applicant obtains relief based on the proposition that he has a valid subsidiary protection application pending, that would be a collateral attack on the decisions affirming and amending the deportation orders in 2015 and 2017. This is because the Minister would not have had jurisdiction to make those decisions. The applicant cannot circumvent s. 5 of the 2000 Act in this manner: see *X.X. v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May, 2018) *per* Hogan, J., *Nawaz v. Minister for Justice Equality and Law Reform* [2012] 12 JIC 1903 (Unreported, Supreme Court, 29th November, 2012) *per* Clarke J., as he then was, *Smith v. Minister for Justice and Equality* [2013] IESC 4 [2013] 1 I.R. 294, *K.R.A. v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017) *per* Ryan P at paras. 39 and 42, *A.S. v. Bangladesh* [2015] IEHC 417 (Unreported, Stewart J., 7th July, 2015).

21. The applicant submits that if the respondent is correct, anyone subject to a deportation order would be precluded from applying for protection (para. 6 of supplemental submissions). That is a misunderstanding. There is no preclusion on either a reapplication or a first application for protection. The point is that where the Minister generates a decision to which s. 5 applies, such a decision must be challenged in accordance with that section. The applicant cannot simply ignore that decision and challenge a later decision on a basis that would have invalidated the earlier decision.

22. While that is sufficient to dispose of the proceedings, I will deal with the hypothetical that I am wrong about that, and will consider the application on its merits such as they are.

Was the application for subsidiary protection on 9th December, 2013 valid?

23. The applicant submits that he was entitled to apply on the basis of the 2006 regulations after their revocation. The validity of that proposition depends on (a) the applicant having had a right under the 2006 regulations; and (b) that right being enforceable after the revocation of those regulations.

24. I will assume, without deciding, that the applicant had such a right. Could he enforce it after the revocation of the 2006 regulations? His argument is that the right was preserved by s. 27 of the Interpretation Act 2005. However, that section only applies if there is more than simply a right to take advantage of the repealed legislation: see *Minister for Justice, Equality and Law Reform v. Tobin (No. 2)* [2012] 4 I.R. 147 [2012] IESC 37, *per* O'Donnell J., at p. 353, relying on Bennion, *Statutory Interpretation*, 4th Ed. (London, 2002) to the effect that the type of right at issue "must not have been a mere right to take advantage of the enactment now repealed" (p. 259). O'Donnell J. also relied on *Craies on Legislation* (9th Ed.) (London, 2008) para. 14.4.12 to the effect that "the saving does not apply to a mere right to take advantage of a repealed enactment (clearly, since that would deprive the notion of a repeal of much of its obvious significance). Something must have been done or occurred to cause of a particular right to accrue under a repealed enactment". I have discussed the correct interpretation of s. 27 at some length in *S.G. (Albania) v. Minister for Justice and Equality* [2018] IEHC 184 [2018] 3 JIC 2311 (Unreported, High Court, 23rd March, 2018).

25. An expansive interpretation of s. 27 as proposed by the applicant would significantly interfere with the right of the Oireachtas to repeal legislation as and when thought appropriate. It seems to me that the respondents were correct not to process an application under the 2006 regulations after the revocation of those regulations, nor does the applicant come within reg. 3 of the 2013 regulations as he did not get a notice under s. 17(5) of the Refugee Act 1996. Furthermore, he is not covered by the transitional provisions in the 2013 regulations.

26. The applicant submits that there would be an injustice to him not to apply s. 27 of the 2005 Act because he would "be left in a position where he could no longer apply for subsidiary protection due to the second respondent's failure to invite him to do so". That is a misunderstanding. It was the applicant's failure to challenge the deportation order that underlies his current legal situation. The Minister's failure to invite the applicant to make a subsidiary protection application in the proposal to make that deportation order cannot now be challenged.

27. There was, therefore, no right to make the subsidiary protection application at the time it was made in terms of Irish law. I turn now to EU law.

Does the applicant have any rights under the qualification directive?

28. The subsidiary protection entitlement under the qualification directive is confined to those who are refused asylum: see Case C-604/12 *H.N. v. Minister for Justice and Equality* at para. 30. Article 2(e) of the qualification directive confines eligibility for subsidiary protection to a person "who does not qualify as a refugee". Thus a prior or simultaneous refusal of refugee status is a precondition for subsidiary protection. EU law is generally prospective only: see *Stato v. SRL Meridionale Industria Salumi* (Cases 212 – 217/80) [1981] ECR 2735, Case C-256/07, *Mitsui & Co. Deutschland* [2009] ECR I-1951, *A.F.F. v. Refugee Applications Commissioner* (Unreported, Faherty J., 23rd February, 2018) especially para. 42, and para. 86 of judgment of Fennelly J. in *Izevbekhai*.

29. Thus, a person whose asylum claim is rejected prior to the commencement of the qualification directive such as this applicant does not have an EU law right to apply for subsidiary protection.

Is the application out of time because the impugned decision is a reiteration of a previous unchallenged decision?

30. If I am wrong about all of the foregoing, I will consider whether the application is out of time. It is clear that a reiteration of a previous decision is not a new decision such as to restart the clock for judicial review: see *Finnerty v. Western Health Board* [1998] IEHC 143 (Unreported, Carroll J., 5th October, 1998), and the decision of the Supreme Court in *Sfar v. Revenue Commissioners* [2016] IESC 15 (Unreported, Supreme Court, 16th March, 2016) *per* McKechnie J.).

31. The applicant is massively out of time to challenge the first refusal to process the subsidiary protection claim in 2015. Indeed, he

is out of time to challenge the second and third refusal as well. A fourth refusal in 2017 does not restart the clock for this purpose. The wheeze of asking a decision-maker to reconsider or repeat a previous unchallenged decision does not generate a new decision for the purposes of limitation periods for judicial review. The grounds first arose in 2015 and the present application is hopelessly and unsalvageably out of time. However, this is possibly academic because the proceedings fail as a collateral challenge to a decision governed by s. 5, and on the merits, in any event.

Order

32. The application is dismissed.