

## **Judgment of the Court of Justice of the European Union on the subsidiary protection system in Ireland**

On 22<sup>nd</sup> November last, the Court of Justice of the European Union (CJEU) in the M.M. case again sent a clear message to the Irish government regarding their failure to adequately implement European law in the area of asylum and, more specifically in this instance, subsidiary protection. This follows the judgment of the same court on 7th April last year in infringement proceedings brought by the Commission finding that Ireland had failed to fully transpose Directive 2005/85/EC (the Procedures Directive) within the prescribed period. The HID and BA case is another case currently before the Court where a decision is awaited concerning further fundamental defects claimed to exist in the Irish procedures implementing European directives more generally in this area. Since the M.M. case was decided yet another question was referred to the European Court regarding asserted defects in our subsidiary protection procedures. The legal consequences of such failures are inevitably protracted and extremely expensive, but most importantly, entirely avoidable.

In an area which is long overdue reform there has been a consistent failure by successive governments to bring in the legislative change necessary. The Immigration Residence and Protection Bill 2010, now in its umpteenth incarnation, still languishes on the legislative agenda with no obvious enactment date in sight. The consequences of this consistent inaction are sadly borne by some of the most vulnerable in our society who are forced to interact with an unfair and inefficient system; for many applicants an asylum or subsidiary protection decision may ultimately be found, years later, to have been unfair by the Irish courts only to be required to restart the lengthy process anew. It's not unusual for Applicants to succeed in Judicial Review proceedings only to be again refused protection in a manner that warrants fresh legal proceedings. The cost in human lives is matched only by the waste of tax-payers money in standing over a system that is not fit for purpose and which the government spends more in trying to defend than they do on reform.

M.M. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General, arose out of a preliminary reference on a question of law from the Irish High court to CJEU in a judicial review case seeking to challenge a negative subsidiary protection decision. Subsidiary Protection is a complementary form of protection that may be available to those who do not qualify for refugee status and stems from the European Directive 2004/83 known more commonly as the qualification directive. A person will qualify for subsidiary protection where substantial grounds have been shown for believing that if returned to his or her country of origin they would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. Serious harm is defined as: Death penalty or execution; Torture or inhuman or degrading treatment or punishment ; or Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The Applicant in M.M. is a Rwandan national of Tutsi ethnicity who initially came to Ireland on a student visa; he graduated with a Masters in law from an Irish University in November 2007. He subsequently carried out research work here relating to war crimes and genocide. When his student visa expired he applied for asylum on 1 May 2008 and was subsequently refused. That claim and his subsequent claim for subsidiary protection is based on the assertion that were he to return to his

country of origin, he would run the risk of being prosecuted before a military court for having openly criticised the manner in which investigations into the 1994 genocide were carried out. He further asserts that he has been severely affected by that genocide as his parents, three of his brothers and one of his sisters were killed.

The point of law before the CJEU related to a technical point of interpretation of the qualification directive, specifically: does the requirement to cooperate with an Applicant imposed on a Member State in Article 4(1) require the administrative authorities to supply the Applicant with the results of such an assessment before a decision is finally made so as to enable him or her to address those aspects of the proposed decision which suggest a negative result?

In finding against the Applicant and coming to the conclusion that the Directive does not in fact necessitate such an approach the Court none-the-less took the opportunity to make a very pointed criticism of the two-stage process in Ireland and what it sees as manifest defects. Ireland is alone in Europe in not having a single unified procedure for the determination of both refugee status and subsidiary protection. Applicants may only apply for subsidiary protection after completing the asylum process and receiving a refusal; this is the case even where an Applicant himself acknowledges that he does not qualify for refugee status and wishes solely to make an application for subsidiary protection (this necessity to first apply for asylum and the legality of that requirement is the subject of the most recent preliminary reference from the Irish Courts). No oral hearing is currently provided for; the application is made in accordance with the Irish regulations which transpose the directives by completing a prescribed questionnaire and applications are frequently determined by reference to evidence heard earlier during the asylum process and previous credibility findings.

The European Court has now however thrown into doubt the legitimacy of that entire procedure. It said it could not accept the view that, where an application for subsidiary protection is dealt with in a separate procedure, it is not necessary for the Applicant to be heard again. It said that it is important that the Applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures. It emphasised that that interpretation is all the more justified in a situation where the national authority, when stating the grounds for its decision to reject the application for subsidiary protection, referred to a large extent to the reasons it had already relied on in support of its rejection of the asylum application.

Following its pronouncement on the law, the European Court referred the case back to the Irish High Court to determine whether the procedure followed in the Applicant's case was compatible with the requirements of EU law emphasising that Member States must not interpret national law in a manner that would conflict with the fundamental rights protected by EU law; the question of costs was also left to the High Court to decide.

The full extent of the legal fallout from this decision remains to be seen as the High Court has yet to deal with the case on its return from Europe. Although the right to be heard does not necessarily need to take the form of a full oral hearing the dissatisfaction of the CJEU with the Irish procedure was evident. Were it found that a second oral hearing was required it would be a labour intensive and expensive procedure that could not be justified by any analysis. Indeed it has long been accepted that a single unified procedure for the determination of subsidiary protection and refugee status is by far the better option. Unfortunately this is another example where successive

governments have failed to bring in the legislative reform necessary to bring our system into line with best practice and international norms. Again a European Court has criticised Ireland for its failure to sufficiently regulate how it meets its obligations under International European law; it is likely to prove to be a very expensive lesson.

What we can say at this juncture with some certainty is that the bulk of people currently waiting for their subsidiary protection claim to be determined<sup>1</sup> will most likely now insist on vindicating their right to be heard as promulgated by the European Court. Were the already over-burdened State determination system required to now process all of these applications by way of full oral hearings it would inevitably lead to lengthy delays and of course more litigation. The problem doesn't end there however, of the thousands of people in this country currently awaiting deportation<sup>2</sup>, a large percentage of those will have had their deportation orders predicated on a negative subsidiary protection decision. If the procedure followed in coming to a negative determination was fundamentally flawed from day-one it is entirely possible that those deportation orders are now of questionable validity. At the very least the State can expect a flood of applications seeking to have their deportation orders revoked and their applications for subsidiary protection reconsidered. Regrettably the Irish public is once again forced to ponder the cost of prolonged legislative inaction, both in human and financial terms.

---

<sup>1</sup> In 2008, 479 decisions were made on applications for subsidiary protection of which seven were granted, 680 decisions made in 2009 of which 27 were granted, 521 made in 2010 of which four were granted and 884 made in 2011 of which 13 were granted. On 7<sup>th</sup> March Minister Shatter stated "There is currently a very high volume of cases on hand", (Dáil Questions - 12974/12 and 18190/12)

<sup>2</sup> In 2008, there were a total of 757 deportation orders signed, of which 161 were effected; in 2009, there were a total of 1,077 deportation orders signed, of which 291 were effected; up until 31 August 2010, 495 deportation orders were signed, of which 171 were effected. It should be noted that many of those may have since left the State voluntarily. (Dáil Question 35368/10)