[2020] IEHC 647

HIGH COURT
JUDICIAL REVIEW

RECORD NO.: 2020/648/JR

BETWEEN:

AHS

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms Justice Tara Burns delivered on 8th day of December 2020.

General

1. The Applicant is a citizen of Iraq. He made an application for international protection within the State on 3 April 2019. A Eurodac search disclosed that he had lodged an application for international protection in the United Kingdom on 15 February 2019.

2. The Applicant was interviewed by the International Protection Office (hereinafter referred to as "the IPO") under Article 5 of EU Regulation 604/2013 (hereinafter referred to as "the Dublin III Regulation") on 7 May 2019. On 14 May 2019, a request was made to the United Kingdom to take back the Applicant under Article 18(1)(b) of the Dublin III Regulation, which provides for a take back where an applicant has a protection application under examination in that other State. On the 22 May 2019, the United Kingdom agreed to take back the Applicant under Article 18(1)(c), which provides for a take-back where a protection application has been withdrawn.

3. The IPO issued the Applicant with a Notice of Decision to Transfer on 5 July 2019. The Applicant appealed to the First Respondent on 12 July 2019 on the following grounds: that the IPO failed to give any consideration to Article 17 of the Dublin III Regulation; failed to have regard to the United Kingdom's withdrawal from the European Union, and the legal uncertainty arising therefrom; and, failed to have regard to the Applicant's family connections, namely two cousins, who were living in the State.

4. An oral hearing was conducted before the First Respondent on 24 September 2019. On 29 June 2020, the First Respondent determined that:-

    - It had no jurisdiction to exercise an Article 17 discretion.

    - Having regard to the judgment of the CJEU in *MA v. International Protection Appeal Tribunal* Case C-661/17, as the United Kingdom remained a party to the Dublin III Regulation and subject to EU law, the First Respondent must deal with matters as they currently stand which meant that there was no basis for setting aside the transfer decision.

    - There was a presumption that the United Kingdom would continue to abide by its obligations under the Geneva Convention and the ECHR; the Applicant had not rebutted this presumption; and, there was no reason to presuppose that any issue of refoulement or systemic deficiency would arise by virtue of the United Kingdom's

pending departure from the European Union or that its departure from the European Union would result in any diminution of the rights of a person in the position of the Applicant such that there was a real risk that he would be subject to inhuman or degrading treatment.

- The fact that the Applicant had cousins residing within this jurisdiction did not mean that Article 7.3 of the Dublin III Regulation applied, as Articles 8, 10 and 16 of the Dublin III Regulation were not applicable in the case.

The First Respondent, accordingly, affirmed the Decision to Transfer the Applicant to the United Kingdom.

5. On 24 August 2018, the Second Respondent wrote to the Applicant requiring him to present himself at the Garda National Immigration Bureau on 12 September 2020 to make arrangements for his transfer. The Applicant was written to in similar terms again on 21 September 2020.

6. On 15 September 2020, the Applicant requested the Second Respondent by letter to (i) cancel the decision to transfer the Applicant to the United Kingdom with immediate effect; (ii) in the alternative, provide an immediate undertaking that no further action will be taken to transfer the Applicant to the United Kingdom pending the determination of his application for Article 17 relief; (iii) grant the Applicant discretionary relief under Article 17 of the Dublin III Regulation to permit him to continue with his application for international protection in Ireland.

7. On the 11 October 2020, the Applicant sought leave to bring Judicial Review proceedings seeking the following reliefs:-

(i) A Declaration that the transfer at this time of international protection applicants to the United Kingdom would be in breach of Article 3(2) of the Dublin III Regulation as there are substantial grounds to believe that there are "*systemic flaws in the asylum procedure and in the reception conditions for applicants*" in the United Kingdom in light of the approval by the House of Commons of the Internal Market Bill, widely considered to be a breach of international law;

(ii) An Order of *Certiorari* of the decision of the First Respondent dated 29 June 2020 affirming the Transfer of the Applicant to the United Kingdom;

(iii) An Order of *Certiorari* of the decision of the Second Respondent to execute the transfer of the Applicant to the United Kingdom and/or refusing to grant the Applicant discretionary relief under Article 17 of the Dublin III Regulation;

(iv) An Order of *Mandamus*, if required, to compel the Second Respondent to make a determination in respect of the Applicant's request for discretionary relief under Article 17 of the Dublin III Regulation;

8. This Court determined to put the State on notice of this leave application. Having done so, the matter was set down for a telescoped hearing on 27 November 2020. Matters were adjourned to 2 December 2020 to conclude the hearing of the action.

Reliefs at Issue

9. In the course of the hearing before this Court on 27 November 2020, the Court enquired as to when the Second Respondent envisaged determining the Article 17 application made to her on 15 September 2020 by the Applicant. On the adjourned date of 2 December, Counsel on behalf of the Second Respondent indicated that the Second Respondent would determine the Article 17 application by 16 December 2020. In light of that indication by the Second Respondent, the relief of Mandamus sought at paragraph (d)4 of the Statement of Grounds no longer arises to be considered by this Court.

10. The relief sought at paragraph (d)3 is not a relief which can properly be sought on the evidence before the Court. As stated by the CJEU in *MA v. International Protection Appeal Tribunal* Case C-661/17:-

> *"[I]f a Member State refuses to use the discretionary clause set out in Article 17(1) of the Dublin III Regulation, that necessarily means that that Member State must adopt a transfer decision."*

As the Notice of Transfer was affirmed by the First Respondent, the Second Respondent does not have a discretion as to whether to execute that decision in the absence of exercising her Article 17 discretion. The Second Respondent has not refused, nor did she ever indicate that she was refusing to grant the Applicant discretionary relief pursuant to Article 17. She has indicated that she will consider this application and has now indicated that she will determine it by 16 December 2020. Accordingly, this relief is not available to the Applicant having regard to the factual and legal matrix before the Court.

11. The reliefs which remains open to the Applicant to seek are those which are sought at paragraph (d)2, namely an Order of Certiorari quashing the decision of the First Respondent and at paragraph (d)1, namely a Declaration that the transfer of the applicant is contrary to Article 3(2) of the Dublin III Regulation.

Certiorari of First Respondent's decision

12. The grounds on which it is sought to quash the First Respondent's decision affirming the Decision to Transfer are twofold namely that the First Respondent erred and/or engaged in unfairness and/or irrationality in the assessment, under Article 3(2) of the Dublin III Regulation, of the implications for the Applicant of the withdrawal of the United Kingdom from the European Union, and in the assessment of the separation of the Applicant from his family in Ireland.

Article 3(2) of the Dublin III Regulation

13. It is important to re-emphasis the role which this Court has in the Judicial Review procedure with respect to the relief of Certiorari sought. The Court's function is to review the decision-making process of the First Respondent. It is not the role of this Court to make a free-standing determination as to whether it is appropriate for the Applicant to be

transferred to the United Kingdom. The decision maker in relation to a Decision to Transfer pursuant to the Dublin III Regulation is the IPO, and on appeal, the First Respondent. The Second Respondent, who has not concluded her role yet, has a discretion, pursuant to Article 17 of the Dublin III Regulation, not to effect a Transfer ordered. In the present case, this Court's role is limited to reviewing the decision made by the First Respondent as the Second Respondent has not made any determination pursuant to Article 17, as of yet.

14. Accordingly, this Court is reviewing the decision of the First Respondent based on the material before the First Respondent at the time of its decision. If material was not before the First Respondent at the time of its decision or if arguments were not made to the First Respondent, it is inappropriate for this Court to have regard to those in this process as that would involve this Court in engaging in a form of de novo appeal rather than a form of review.

15. Article 3(2) of the Dublin III Regulation prevents the transfer of an applicant for international protection in circumstances where there are "*substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union*"

16. The First Respondent dealt with the proposed transfer of the Applicant to the United Kingdom having regard to the withdrawal of the United Kingdom from the European Union in the following manner:-

> *"In an advisory referendum in June 2016, the public in the United Kingdom voted to leave the European Union. However, as noted above, the CJEU in MA v. International Protection Appels Tribunal (Case C-661/17) ruled the UK should continue to be treated as a Member State of the European Union and the assessment of the Dublin III Regulation should not be varied on the basis of their prospective departure from the Union.*
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> *Under the withdrawal agreement, the United Kingdom remains subject to European Union law and a party to the Dublin Regulation. The Tribunal must deal with matters as they are at present and therefore sees no basis for setting aside the transfer decision because of the outcome of the June 2016 referendum or the pending departure of the United Kingdom from the European Union. In so finding the Tribunal has considered the judgment in MA v. International Protection Appeals Tribunal (Case C-661/17) at paragraphs 53 to 61.*
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> *Similarly, there is no reason to presuppose that any issue of refoulment or systemic deficiency would arise by virtue of the United Kingdom's pending departure from the European Union or that their departure from the European Union will result in any diminution of the rights of a person in the position of the Appellant. There is no reason to conclude, by returning the Appellant to the United Kingdom, that the*

Appellant would face a real risk of being subjected to inhuman or degrading treatment. The Appellant has not rebutted the presumption that his treatment in the United Kingdom would continue to comply with the Geneva Convention and the European Convention on Human Rights ("the ECHR)

There is no reason to conclude that the departure of the United Kingdom from the European Union would, of itself, provide substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the United Kingdom, resulting in a risk of inhuman or degrading treatment within the meaning of article 4 of the Charter of Fundamental Rights of the European Union ("the Charter"). The wording of article 4 of the Charter and article 3 of the ECHR are identical and the United Kingdom will continue to be bound by the ECHR. Accordingly, the Tribunal is not satisfied that the Appellant would be deprived of any legal certainty if transferred to the United Kingdom or that the Tribunal should refuse to transfer the Appellant on that basis."

17. It is appropriate to set out in detail, the CJEU's judgment in *MA v. International Protection Appeal Tribunal* Case C-661/17, which dealt with the specific question of the United Kingdom's withdrawal from the European Union and its implications for the Dublin III Regulations. The CJEU stated at paragraph 54:-

> *"[I]t should be recalled that a Member State's notification of its intention to withdraw from the European Union in accordance with Article 50 TEU does not have the effect of suspending the application of EU law in that Member State and that, consequently, that law continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union."*

and at paragraphs 80 to 85:-

"80. [I]t should be pointed out that that notification, as follows from paragraph 54 of the present judgment, does not have the effect of suspending the application of EU law in that Member State and that, consequently, that law, of which the Common European Asylum System forms part, and the mutual confidence and presumption of respect, by the Member States, for fundamental rights, continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union."

81. It should also be added that, in accordance with the case-law of the Court, the transfer of an applicant to such Member State must not take place if there are substantial grounds for believing that that notification would result in a real risk of that applicant suffering inhuman or degrading treatment in that Member State, within the meaning of Article 4 of the Charter.

82. In that connection, it should be noted that such a notification cannot, in itself, be regarded as leading to the person concerned being exposed to such a risk.

83. In that regard, it is important to state first, that the Common European Asylum System was conceived in a context making it possible to assume that all participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, namely the principle of non-refoulement, and on the ECHR, and, therefore, that those Member States can have confidence in each other as regards respect for those fundamental rights; all of those States are, moreover…. Parties to the Geneva Convention and the 1967 Protocol and to the ECHR.

84. Second, as regards the fundamental rights that are conferred on an applicant for intentional protection in addition to the codification, in Article 3(2) of the Dublin III Regulation, of the Court's case-law concerning systemic flaws in the asylum procedure and in the reception conditions of asylum seekers in the State designated as responsible, within the meaning of that regulation, the Member States, as follows from recitals 32 and 39 of that regulation, are also bound, in the application of that regulation by the case-law of the European Court of Human Rights and by Article 4 of the Charter… As Article 4 of the Charter corresponds to Article 3 ECHR, the prohibition of inhuman or degrading treatment laid down in Article 4 has, in accordance with Article 52(3) of the Charter, the same meaning and the same scope as those conferred on it by that convention.

85. Third, as has been set out in paragraph 83 of the present judgment, since the Member States are parties to the Geneva Convention and the 1967 Protocol, as well as to the ECHR, two international agreements upon which that Common European Asylum System is based, the continuing participation of a Member State in those conventions and that protocol is not linked to its being a member of the European Union. It follows that a Member State's decision to withdraw from the European Union has no bearing on its obligations to respect the Geneva Convention and the 1967 Protocol, including the principle of non-refoulement, and Article 3 ECHR."

18. On the basis of the evidence before the First Respondent and having regard to the decision of the CJEU in *MA v. International Protection Appeal Tribunal* Case C-661/17, the decision of the First Respondent was entirely open to it to make. The First Respondent did not err in its decision to affirm the IPO's decision to Transfer the Applicant. Neither has unfairness or irrationality been established with respect to the decision-making process of the First Respondent in relation to this issue.

19. In the course of the hearing before this Court, there has been a suggestion that because the Applicant will be classified as an absconder, he will be subject to detention in the United Kingdom if returned there and will be subject to inhuman or degrading treatment. Material in relation to this assertion is now produced before the Second Respondent in the Article 17 application. This material was not produced before the First Respondent. It is entirely inappropriate that I consider this material when reviewing the First Respondent's decision as it was not originally considered. However, I note that the United Kingdom

remains a signatory to the Geneva Convention and the 1967 Protocol and is bound by Article 3 of the European Convention of Human Rights.

Failure to consider the Applicant's Family rights

20. The Applicant is residing with two of his cousins within the State. These are not persons who have made a protection claim in the State. The Applicant asserts that the First Respondent erred and/or acted unfairly and/or irrationally by failing to consider his connection with his two cousins when affirming the Transfer Order.

21. The First Respondent determined that consideration of the Applicant's connection with his cousins did not arise for its consideration pursuant to Article 7.3 of the Dublin III Regulation.

22. The First Respondent's jurisdiction to consider family connections within the State when determining whether to issue a Transfer Decision pursuant to the Dublin III Regulation is contained at Article 7.3 thereof which states:-

> *"In view of the application of the criteria referred to in Articles 8, 10 and 16, Members States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance."*

23. Accordingly, the First Respondent has jurisdiction to consider "*family members, relatives or any other family relations*" resident in Ireland for the purpose of determining whether the criteria referred to in Article 8, 10 and 16 apply.

24. Article 8 relates to a minor applicant, hence it is not applicable to the present case. Article 10 refers to "family members" who have made an application for international protection. The Dublin III Regulation defines "*family members*" at Article 2(g) as:

> *"insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States:*
>
> - *the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,*
>
> - *the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,*

- *when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,*

- *when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present;"*

Clearly, the relationship of a cousin is not covered under the definition of "*family members*". Furthermore, the Applicant's cousins are not applicants for international protection. Accordingly, Article 10 does not apply in the present case. Neither does Article 16 of the Dublin III Regulation apply as it refers to a situation where an applicant is dependent on the assistance of his child, sibling or parent (or they on him) because of pregnancy, a new born child, severe illness, severe disability or old age. Again, these circumstances do not arise in the present case.

25. Accordingly, the First Respondent did not err or engage in unfairness or irrationality when it determined that consideration of the Applicant's connection with his cousins did not arise for its consideration in the assessment of the hierarchy of criteria contained in the Dublin III Regulation. The First Respondent's determination to affirm the Transfer Decision was made on a correct analysis of the law. Wider considerations with respect to family relationships were not open to it to determine.

Declaration

26. A Declaration is also sought at paragraph (d)1 of the Statement of Grounds to the effect that the transfer of the Applicant "*would be in breach of Article 3(2) of the Dublin III Regulation as there are substantial grounds to believe that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the United Kingdom in light of the approval by its House of Commons of the Internal Market Bill, widely considered to be a breach of international law*".

27. A number of significant difficulties arise with respect to the Declaration sought. Firstly, and most importantly, the Internal Market Bill, is just that. It is not an Act of the Houses of Parliament and accordingly, it is not the law of the United Kingdom. It was rejected by the House Lords, before being reintroduced in the House of Commons yesterday. This Court will not grant declaratory relief on a measure which has no lawful or binding effect. Secondly, the Internal Market Bill has nothing to do with asylum law and the United Kingdom's international commitments relating to asylum law. The argument being made is because the Bill, as promulgated, reflected an intention to break international agreements entered into by the United Kingdom, an inference could be drawn that the United Kingdom would in the future depart from its international asylum commitments. This is wild conjecture on the part of the Applicant who, in fairness, did not rely too heavily on this argument. Thirdly, as a matter of logic the approval by the House of Commons of the Internal Market Bill does not lead to a conclusion that there are substantial grounds to believe that there are currently systemic flaws in the asylum procedure and the reception conditions for the Applicant. Deriving as these do from

European Law, the asylum procedure and reception conditions for applicants will remain exactly as they presently are immediately after the expiry of the transition period having regard to s. 2 of the European Union (Withdrawal) Act 2018 which states that "*EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.*"

Breach of EU Law

28. In the Statement of Grounds, there is reference at paragraph e(6) to a breach of EU Law by the Second and Third Respondents in their failing to put in place a transparent system for an Article 17 application to be made to the Second Respondent. What relief is sought on foot of this is not specified. Ms Justice O'Regan in *U v. The Refugee Appeals Tribunal* [2017] IEHC 490 found that there was no requirement on the Second Respondent to publish a policy or criteria in respect of the exercise of the Article 17 discretion.

29. In the present case, the application to the Second Respondent to exercise her discretion pursuant to Article 17 was made on 15 September 2020. The Second Respondent has indicated that she will determine this application by 16 December 2020, the decision to transfer having been made by the First Respondent on 29 June 2020. No issue arises in terms of transparency having regard to that time line.

Returning the Applicant to this jurisdiction should an Article 17 decision be made against him which is invalid

30. A significant portion of the hearing in this matter related to the non-application of the Dublin III Regulation to the United Kingdom after the end of the transition period in the absence of an agreement between the European Union and the United Kingdom in respect of same. Due to the fact that the First Respondent initially had not indicated a timeline for the determination of the Article 17 application, this was a live issue in the case in light of the fact that this Court set aside a "global injunction" which had applied since the time the proceedings were filed pursuant to Paragraph 8(2) of the High Court Practise Direction 81 which had prevented the Applicant's removal from the State. In light of the First Respondent's indication that she will determine the Article 17 application by 16 December, and assuming that she will not take steps to transfer the Applicant before 16 December, that issue is premature until such time as an indication to transfer arises. Furthermore, it is not relevant to the reliefs sought in the Statement of Grounds.

31. I therefore refuse the Applicant the relief sought.