APPROVED **[2024] IEHC 470**

THE HIGH COURT
JUDICIAL REVIEW

2024 427 JR

BETWEEN

T.T.
(TRANSFER DECISION)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 31 July 2024

INTRODUCTION

1. These judicial review proceedings seek to challenge a decision of the International Protection Appeals Tribunal ("*IPAT*"). The principal issue for determination by the High Court concerns the significant delay on the part of the Irish State in notifying the European Commission of the designation of IPAT as one of the competent authorities for the purpose of the Dublin III Regulation.

On the Applicant's argument, the Irish State is precluded, by reason of this delay, from purporting to transfer his application for international protection to another Member State pursuant to the "*take back*" mechanism under the Dublin III Regulation.

CHRONOLOGY

2. The chronology of the Applicant's applications for international protection is as follows:

June 2019	Application for international protection in Sweden
March 2022	Application rejected; leave to appeal refused
26 January 2023	Application for international protection in Ireland
1 March 2023	"*Take back*" request to Swedish authorities
7 March 2023	Sweden accepts responsibility for IP application
19 May 2023	Notice of IPO's decision to transfer application
25 May 2023	Appeal made to IPAT
4 December 2023	Irish State notifies EU Commission of designation
21 February 2024	IPAT's decision
14 March 2024	Publication in *Official Journal of European Union*
26 March 2024	Judicial review proceedings instituted
13 May 2024	Leave to apply for judicial review granted *ex parte*
23 July 2024	Hearing of judicial review proceedings

3. As appears, the Irish State had first notified the European Commission of IPAT's designation as a competent authority on a date *after* the Applicant's appeal had been filed, but *before* the appeal had been determined by IPAT.

PROCEDURAL HISTORY

4. The allocation of responsibility between the Member States of the European Union in relation to applications for international protection is governed by Regulation (EU) No. 604/2013 ("*Dublin III Regulation*"). Insofar as relevant to these proceedings, the Dublin III Regulation addresses the contingency of an individual making a series of applications for international protection as follows. The Member State which rejected the first application may be obliged to "*take back*" an individual who has since made a second application in another Member State or who is on the territory of another Member State without a residence document. As explained below, IPAT has determined that this provision pertains to the Applicant.

5. The Applicant made an application for international protection in Ireland on 26 January 2023. A search against the Applicant's fingerprints on the EURODAC database resulted in a "*hit*" with the Swedish authorities. This is because the Applicant had lodged an application for international protection in Sweden in June 2019. This application was rejected and appears to have been finally disposed of by a decision of the (Swedish) Migration Court of Appeal in March 2022 refusing leave to appeal.

6. The Applicant was formally notified on 19 May 2023 that the Irish State would not be examining his application under the International Protection Act 2015 and his application for international protection would, instead, be transferred to Sweden ("*the transfer decision*").

7. The reasons were summarised as follows in the notice of decision:

> "Details provided by EURODAC show that you lodged an application for international protection in Sweden on 10/06/2019, prior to your application in this State on 26/01/2023.

> Based on the positive EURODAC hit with Sweden and as there was no evidence to suggest that you left the EU territory since your asylum application in Sweden 10/06/2019, a request in accordance with Article 18.1(b) of Regulation (EU) No 604/2013 was made to Sweden on 01/03/2023.
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> On 07/03/2023, Sweden agreed to accept Ireland's request, in accordance with Article 18.1(d) of Regulation (EU) No 604/2013.
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> Article 18.1(d) of Regulation (EU) No 604/2013 provides that: *The Member State responsible under this Regulation shall be obliged to take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document.*
>
> The appropriate authorities in Sweden have agreed to re-admit you to that country pursuant to the above EU Regulation."

8. The Applicant was informed that he was entitled to appeal the decision of the IPO to the IPAT within ten working days of the date of the notice of decision. It was explained that an appeal of the decision would confer the right to remain in the State pending the outcome of that appeal.

9. The Applicant duly exercised his right of appeal and IPAT convened a hearing on 8 September 2023. IPAT made a decision on 21 February 2024 affirming that the decision to request Sweden to "*take back*" was in order and in accordance with the Dublin III Regulation hierarchy. It is this decision which is impugned in these judicial review proceedings.

10. It should be explained that the correctness of IPAT's decision is not challenged on its merits. Rather, the Applicant makes a different argument to the effect that the Dublin III Regulation does not govern his case. This argument is predicated

on the delay on the part of the Irish State in complying with Article 35 of the Dublin III Regulation.

11. Article 35 reads as follows:

> "1. Each Member State shall notify the Commission without delay of the specific authorities responsible for fulfilling the obligations arising under this Regulation, and any amendments thereto. The Member States shall ensure that those authorities have the necessary resources for carrying out their tasks and in particular for replying within the prescribed time limits to requests for information, requests to take charge of and requests to take back applicants.
>
> 2. The Commission shall publish a consolidated list of the authorities referred to in paragraph 1 in the Official Journal of the European Union. Where there are amendments thereto, the Commission shall publish once a year an updated consolidated list.
>
> 3. The authorities referred to in paragraph 1 shall receive the necessary training with respect to the application of this Regulation.
>
> 4. The Commission shall, by means of implementing acts, establish secure electronic transmission channels between the authorities referred to in paragraph 1 for transmitting requests, replies and all written correspondence and for ensuring that senders automatically receive an electronic proof of delivery. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2)."

12. As appears, the Members States were obliged to notify the European Commission "*without delay*" of the specific authorities responsible for fulfilling the obligations arising under the Dublin III Regulation. The Irish State had notified the European Commission of the designation, in 2014, of the Refugee Appeals Tribunal as a competent authority. For reasons which have not been explained in these proceedings, the Irish State did not notify the European Commission, at the time, of the subsequent designation of IPAT as a competent authority to hear an appeal against a transfer decision. This designation occurred

in March 2018. In the event, the Irish State did not notify the European Commission of the designation of IPAT as a competent authority for several years. The notification was made in December 2023.

13. The European Commission published a consolidated list of competent authorities in the *Official Journal* on 14 March 2024. This is the first time that IPAT has been identified, in the *Official Journal*, as a designated competent authority.

14. The Applicant contends that the legal consequence of the delay in the notification (and subsequent publication) is to render the Dublin III Regulation inapplicable to cases, such as his, where IPAT had already embarked upon an appeal *prior* to the belated notification to the European Commission. The Applicant further contends that—absent reliance on the Dublin III Regulation—he is entitled to have his application for international protection determined in the Irish State. It follows, on the Applicant's argument, that IPAT were obliged to address his application on its merits.

DISCUSSION AND DECISION

15. It is, in principle, possible to dispose of these judicial review proceedings on a narrow basis. The decision on the appeal was made in February 2024, that is, at a time subsequent to the notification to the European Commission. As of the date of the decision, therefore, the designation of IPAT as a competent authority for the purposes of the Dublin III Regulation had been properly notified. It follows that, even if the Applicant were correct in his contention that notification is necessary to perfect the designation, this had been complied with prior to the date of decision. The fact that the European Commission did not publish a

consolidated list of competent authorities until March 2024 does not affect this analysis. It cannot sensibly be said that publication in the *Official Journal* is a necessary prerequisite to an effective designation in circumstances where Article 35 of the Dublin III Regulation envisages that publication need only take place every twelve months. Had it been intended that publication be a necessary prerequisite then the same imperative language as has been employed in relation to notification, i.e. "*without delay*", would have been employed in the context of publication also. The EU cannot have intended that a competent authority might be in a legal limbo for a period of up to twelve months.

16. This analysis is not undermined by the fact that the notification only occurred *subsequent* to the Applicant having made his appeal to IPAT. The key date for the assessment of whether IPAT had jurisdiction is the date of its decision. The making of an appeal to IPAT had a suspensive effect on the first instance decision of the international protection officer. It was only once IPAT made its decision that any right of the Applicant was engaged. As of the date of the decision, the designation of IPAT had been properly notified to the European Commission. Any supposed deficiency in the designation of IPAT had been spent by the time the decision came to be made.

17. The finding above is, strictly speaking, sufficient to dispose of these judicial review proceedings. Nevertheless, it is proposed to address the broader issues raised in these proceedings for the following reasons. The broader issues raised have the potential to affect a number of other decisions of IPAT. The chronology of decision-making in some cases will be such that the decision will have been made prior to the notification to the European Commission in December 2023. The present proceedings might be regarded as a form of test case. Given that the

broader issues have been carefully and comprehensively argued by experienced counsel, it is appropriate to address same in this judgment. It is also appropriate to address the broader issues lest there be an appeal against this judgment and the narrow finding (above) be held to be incorrect.

18. The Applicant's argument conflates two distinct concepts as follows: first, the designation of the competent authorities, and, secondly, the subsequent notification of that designation to the European Commission. The designation of the competent authorities is a matter of domestic law. See, by analogy, the judgment of the Supreme Court in *North East Pylon Pressure Campaign Ltd v. An Bord Pleanála* [2019] IESC 8, [2021] 1 I.R. 666. The legal basis for the designation is the Dublin III Regulation and the European Communities Act 1972 (as amended). The designation of the respective competent authorities for the various functions under the Dublin III Regulation has been achieved by way of secondary legislation made pursuant to that Act, namely, the European Union (Dublin System) Regulations 2018 (SI No. 62 of 2018).

19. Relevantly, IPAT has been designated as the competent authority for the purpose of the appeal/review procedure required under Article 27 of the Dublin III Regulation. Thereafter, the Irish State was obliged to notify the European Commission of that designation. For reasons which have not been explained in these judicial review proceedings, this notification was not attended to until December 2023, i.e. some five years after the designation. The thrust of the Applicant's argument is that notification is an essential step in a staggered process of designation. Put otherwise, notification was necessary in order to perfect the initial act of designation under domestic law.

20. With respect, this argument is not borne out by a consideration of the language of, and purpose of, the Dublin III Regulation. It is apparent from the structure of the Dublin III Regulation that the designation of the competent authorities is a matter solely for the Member States. The European Commission does not have, for example, any function in vetting or approving the entities which the individual Member States designate. The function of the European Commission is confined to monitoring the effectiveness of the competent authorities in the discharge of their responsibilities under the Dublin III Regulation. The European Commission might, in principle, have cause for complaint if the designated competent authorities were not properly resourced or their members not properly trained. These are separate issues from the overarching decision as to which entities to designate as competent authorities.

21. In assessing the legal consequences, if any, of a significant delay in notification, it is proper to have regard to the purpose and objective of the imposition of the notification requirement under Article 35. This requires a consideration of the overall scheme of the Dublin III Regulation. In this regard, it is also proper to have regard to the *travaux préparatoires*. The purpose of what is now Article 35 is summarised as follows in the Commission Proposal of 8 December 2008 (Doc. 16929/08) (at pages 19/20):

> "1. Except for terminology adjustments, it is proposed that Member States communicate to the Commission, without delay, the specific authorities responsible for applying this Regulation (e.g. those competent for carrying out transfers, for sharing information etc) and any amendments thereto. This is important for reasons of transparency, as well as in order to allow the Commission to fully exercise its monitoring role.
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> 2. For reasons of transparency, the Commission will publish in the Official Journal of the European Union a consolidated list of the competent authorities. Where there are

> amendments to the list, the Commission will publish an updated consolidated list once a year. These modifications are based on the wording agreed in other legislative instruments, such as in the VIS Regulation."

22. It appears that the notification requirement serves three related purposes as follows: (i) to ensure transparency; (ii) to facilitate the European Commission in monitoring the implementation of the Dublin III Regulation (as envisaged under Article 46); and (iii) to ensure data protection under Article 34 and to establish secure electronic transmission channels between the competent authorities.

23. There is no suggestion in these judicial review proceedings that the first two of these purposes has been frustrated by the belated notification of the designation of IPAT as a competent authority. There is no suggestion, for example, that the European Commission had been unaware of the designation and thus unable to monitor the implementation of the Dublin III Regulation by the Irish State. Nor is there any suggestion that the Applicant in this case was unaware of the identity of the competent authority to whom he should direct his appeal against the first instance transfer decision, i.e. the IPO's decision directing the transfer of his international protection application to Sweden. It is apparent from the documentation that the Applicant was expressly notified of, and availed of, his right of appeal to IPAT. The Applicant benefited from the suspensive effect of the appeal process. The position in relation to the third purpose is, perhaps, more concerning. Article 34 of the Dublin III Regulation imposes limits on the exchange of the personal data of applicants for international protection. Relevantly, the exchange of data is, on one reading at least, strictly confined to those competent authorities which have been duly notified to the European Commission in accordance with Article 35.

24. It might, in principle, have been open to an applicant for international protection to complain that their personal data had been shared with a competent authority, the designation of which had not been formally notified to the European Commission. No such considerations arise, however, in the present case. The Applicant makes no complaint as to data sharing. Generally, the exchange of data will occur at the time of the first instance decision. Here, for example, the fingerprint "*hit*" had resulted in an exchange of information with the Swedish authorities. The Applicant has not sought any relief in relation to the reliance by the international protection officer and IPAT on this information.

25. It should be recorded that the parties, very helpfully, referred me to two judgments of the European Court of Justice which, potentially, have a bearing on the issues: *Skoma-Lux*, Case C-161/06, EU:C:2007:773 and *Aslanidou*, Case C-142/04, EU:C:2005:473.

26. The first judgment concerned the imposition of a fine for customs offences. The relevant EU legislation had not yet been published, in the *Official Journal*, in the official language of the relevant Member State (which had only recently acceded to the European Union). The ECJ held that EU legislation which is not published, in the *Official Journal*, in the official language of a Member State is unenforceable against individuals in that Member State. The ECJ did emphasise, however, that the absence of publication in the relevant language did not affect the *validity* of the EU legislation at issue. The second judgment concerned the failure on the part of a Member State to designate a competent authority for the purpose of assessing vocational qualifications. The ECJ held that designation under the relevant directive had not been necessary in order to identify the competent authorities, and that the failure to designate a competent authority did

not preclude that directive from being relied upon as against the national authority with *de facto* competence to regulate the taking up of a particular profession under the relevant national legislation. A Member State could not rely on its own default to avoid giving effect to an individual's rights.

27. Neither of these two judgments is on all fours with the circumstances of the present case. As to the first judgment, the obligation to publish EU legislation is very different from the publication obligation arising under Article 35 of the Dublin III Regulation. As explained earlier, it cannot sensibly be said that publication in the *Official Journal* is a necessary prerequisite to an effective designation in circumstances where the Dublin III Regulation envisages that publication need only take place every twelve months.

28. As to the second judgment, the analogy is a little stronger. There, a *de facto* designation was sufficient to allow direct effect. Here, the designation has properly been made under domestic law, i.e. there is *de jure* designation. The Irish State is at most, culpable of an omission of a lesser order, namely delay in the subsequent notification of the designation to the European Commission. It would seem to follow, by analogy, that if a failure to designate may be overlooked where there has been *de facto* designation, then there are even stronger grounds for saying that the procedural misstep in the present case does not undermine the validity of the designation.

29. Counsel on behalf of the Applicant submitted that these two judgments of the ECJ illustrate a principled distinction between circumstances where an individual seeks to rely on EU legislation and circumstances where a Member State seeks to enforce EU legislation against an individual. A procedural irregularity—such as a failure to designate a competent authority or to publish

legislation in a particular form—may only be overlooked in the former circumstances. An individual is entitled to rely on EU legislation notwithstanding a procedural irregularity on the basis that a Member State should not be able to rely on its own default to deny an individual his or her EU law rights.

30. Applying this principled distinction to the present case, counsel submits that the Irish State is seeking *to enforce* the Dublin III Regulation *against* the Applicant. This is said to be impermissible in circumstances where, or so it is alleged, there has been a procedural failing in the designation of IPAT.

31. For the reasons already explained, the argument that IPAT has not been properly designated is not well founded. However, even if there had been a procedural failing in this regard, it would be incorrect to characterise the present case as one where a Member State is seeking to enforce EU legislation against an individual. In truth, the provisions of the Dublin III Regulation are in ease of applicants for international protection. It is to the benefit of all intending applicants that there should be a coherent system for the allocation of responsibility for the determination of applications for international protection. The Dublin III Regulation confers an especial benefit upon applicants who are minors or whose family members are already in a particular Member State. The order of hierarchy advances family reunification.

32. Accordingly, if and insofar as it is necessary to characterise the Dublin III Regulation as being availed of by, or enforced against, an individual, it falls within the former category. This is so notwithstanding that the Applicant in these proceedings wishes, for his own reasons, to pursue a (second) application for international protection in the Irish State.

33. There is also a more fundamental question as to whether a Member State could ever rely on its default in relation to a procedural requirement of notification to avoid the carefully constructed provisions in relation to the allocation of responsibility in applications for international protection.

34. Finally, for completeness, it is necessary to say something about an additional argument which the Applicant has sought to advance. This additional argument relates to the training of the members of IPAT. This is not an argument in respect of which leave to apply for judicial review has been granted. The only ground upon which leave was granted still being pursued is that pleaded at (e)(1) of the statement of grounds as follows:

> "The Tribunal had no lawful authority to make a determination under the Dublin III Regulation as it was not a designated body for the purposes of Article 35 of Dublin III. Absent proof that the requirements of Article 35 of the Regulation have been satisfied, the Tribunal could not make an appeal determination. Article 35 sets out that (i) Member States must notify the European Commission of the body responsible for the obligations under the Regulation, (ii) the name of the notified body must be published in the Official Journal of the European Union (iii) the notified body 'shall receive the necessary training with respect to the application of this Regulation'."

35. As appears, the pleaded ground is directed solely to the jurisdiction of IPAT to make an "*appeal determination*" in circumstances where it is alleged that it has not been properly designated. Whereas there is mention of "*necessary training*" in the pleaded ground, this is no more than a recitation of the wording of Article 35. There is nothing in the pleaded ground which would have put the State Respondents on notice of an allegation that the training received by the members of IPAT had been deficient. Still less is there any indication of an intention to impugn IPAT's decision on this basis. The legal challenge is

confined to the "*designation*" point. It has not been suggested that the transfer decision is incorrect on the merits nor that this was the result of a lack of training.

36. In all the circumstances, it would be unfair to allow the Applicant to pursue an argument in relation to an alleged lack of training. This is not mere procedural pedantry: the failure to raise an issue in relation to training in the statement of grounds has denied the State Respondents an opportunity to address this issue by way of evidence.

ESTOPPEL ARGUMENT

37. The State Respondents submitted that the Applicant was, in effect, estopped from raising the Article 35 issue in these judicial review proceedings in circumstances where he had not raised the issue before either the international protection officer or IPAT. The Applicant is accused of having "*acquiesced*" in the appeal to IPAT. Having regard to my findings above, it is, strictly speaking, not necessary to rule upon this objection. The Applicant's claim has failed on the merits and there is no requirement to rule on the estoppel argument. For completeness, however, it is appropriate to make the following observations.

38. It is preferable that legal points, which might subsequently be relied upon in judicial review proceedings challenging a decision, should have first been raised before the decision-maker. The raising of a legal point allows the decision-maker an opportunity to address same. The decision-maker might accept that the point is well made and act accordingly, with the result that the need for judicial review proceedings is obviated.

39. However, there is a respectable argument to the effect that there is a difference in principle between a legal point which goes to the very jurisdiction of the

decision-maker and one which does not. If there is nothing that the decision-maker can do to address the jurisdictional point, then the justification for a rule which insists that the point should have been raised before the decision-maker is weak. The present proceedings are concerned with a legal point which goes to the jurisdiction of IPAT to apply the provisions of the Dublin III Regulation at all. If the legal point had been well founded—and for the reasons explained above it was not—there is nothing that IPAT could have done to address the legal point. In the circumstances, it might seem overly pedantic to say that the Applicant should be precluded from raising the jurisdictional issue in these judicial review proceedings because he failed to raise it before IPAT. Different considerations might have pertained had the State Respondents adduced evidence in these judicial review proceedings that they had not previously known of the potential difficulty created by the (then ongoing) failure to notify the European Commission pursuant to Article 35. In such a scenario, it might have been open to the State Respondents to argue that the raising of the legal point would have had a practical benefit in that steps might have been taken, in response, to remedy the breach sooner. In the event, however, the State Respondents have chosen not to adduce any evidence, in these proceedings, on matters such as the reason for the significant delay or when the legal point first came to their attention. Had it been necessary to reach a definitive conclusion on the estoppel argument, this court would probably have resolved it in favour of the Applicant.

INTERLOCUTORY INJUNCTION

40. The Applicant had sought an interlocutory injunction as part of these proceedings. This relief seems to have been sought in circumstances where there was a concern on the part of the Applicant that the transfer decision might be executed prior to the hearing and determination of these judicial review proceedings. This is because there is a six month time-limit on the validity of a transfer order: see *AHY v. Minister for Justice*, Case C-359/22, EU:C:2024:334.

41. This six month time-limit is set to expire on 20 August 2024. I indicated to the parties at the conclusion of the hearing on 23 July 2024 that I hoped to be in a position to deliver a reserved judgment by 31 July 2024. In the circumstances, the Minister was in a position to give an undertaking, through counsel, not to execute the transfer order in the interim.

CONCLUSION AND PROPOSED FORM OF ORDER

42. For the reasons explained herein, the belated notification to the European Commission of the designation of the International Protection Appeals Tribunal ("*IPAT*") as one of the competent authorities for the purposes of the Dublin III Regulation does not affect the validity of the decision made by IPAT in respect of the Applicant's appeal in February 2024. Accordingly, the application for judicial review must be dismissed in its entirety. In circumstances where judgment has now been delivered, the Minister is released from her undertaking not to execute the transfer order.

43. As to legal costs, my *provisional* view is that there should be no order as to costs, i.e. each side should bear its own costs. The fact that the Applicant has been entirely unsuccessful in the proceedings would ordinarily militate in favour of a

costs order against him. However, there is a public interest element in this litigation. The litigation has produced clarity in relation to the legal consequences, if any, of the acknowledged significant delay on the part of the Irish State in complying with the notification requirement under Article 35 of the Dublin III Regulation. In the circumstances, the Applicant might be relieved of a costs burden. If either side wishes to contend for a different form of costs order than that proposed, they should ask for the matter to be relisted before me at a date convenient to them.

Appearances

Conor Power SC and Philip Moroney for the applicant instructed by Siobhán Conlon Solicitor
David Conlan Smyth SC and Sarah-Jane Hillery for the respondents instructed by the Chief State Solicitor