THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 601 J.R.]

BETWEEN

O.N.

AND

I.M.M.

APPLICANTS

AND

THE REFUGEE APPLICATIONS COMMISSIONER,

THE REFUGEE APPEALS TRIBUNAL AND THE

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice O'Regan delivered on the 17th day of January, 2017

Issues

1. The applicants are seeking to quash the decision of the first named respondent bearing date 10th September, 2015. The decision was made to transfer both applicants' asylum applications to the United Kingdom pursuant to Regulation 604/2013 (the Dublin 3 Regulation).

2. The application grounds are as follows:

> (1) The respondent should have awaited until a medical report was to hand as suggested in a letter from the applicants' solicitor of the 4th September, 2015 prior to making the relevant decision.
>
> (2) The decision did not include any assessment as to what was in the best interest of the second named applicant notwithstanding that the first named respondent was mandated under the relevant regulations to do so.
>
> (3) The Article 5 interview didn't make any assessment of the best interests of the 2nd named applicant.
>
> (4) The application by the respondent to the UK authorities to "take charge" of the applicant's applications was out of time.
>
> (5) The first named respondent failed to inform the first named applicant of the purpose of the s. 5 interview which took place on the 5th August, 2015.

Brief Background

3. The first named applicant is a Nigerian citizen born in July, 1984. She left Nigeria on 14th December, 2014 and arrived in Ireland in or about January, 2015 and subsequently on 14th January, 2015 made an application for asylum in this jurisdiction. This claim was based upon her history that she had been raped by Islamic fundamentalists who also attacked and murdered her sister. Because of the attack the first named applicant became pregnant with the second named applicant.

4. The second named applicant was born in May, 2015 in this jurisdiction and on 28th August, 2015 the second named applicant made an application for asylum which was not before the court however both parties accepted that the application of the second named applicant mirrored the application of the first named applicant.

Take charge application

5. The first named applicant advised the first named respondent from the outset that she had secured a UK visa. On 16th February, 2015 the Irish authorities made a request for information from the UK authorities and on the basis of this request received a response on 26th March, 2015 which confirmed that the first named applicant had received a multi-visit UK visa from the 21st October, 2014 to 21st April, 2015. It also confirmed that she had previously applied for but was refused a visa on 26th June, 2014.

6. Based upon the above response the Irish authorities made a request for "taking charge" of the first named applicant under Article 12(2) or Article 12(3) of the 2013 Regulations. This application was by way of standard form in determining the member states responsible for assessing an application for international protection. It included "other useful information" which identified the date upon which the first named applicant made her asylum application in Ireland and her travel arrangements to Ireland. It also identified that the applicant stated that she was six months pregnant.

7. The UK Home Office in a letter of 12th April 2015 advised that it would accept the transfer of the first named applicant under the terms of Article 12.4.

8. The second named applicant was born on the 19th May, 2015 and the Article 5 interview was held on the 5th August, 2015.

9. On 11th August, 2015 the UK Home Office furnished amended information on the first named applicant and as a consequence the Irish authorities communicated by letter to the UK authorities in a letter bearing date 13th August, 2015 which included the birth certificate of the second named applicant and noted that his father was not named on the birth certificate. In this letter the opening

paragraph refers to the formal request of 14th April, 2015 to take charge of the first named applicant and thereafter reference is made to the UK's acceptance under Article 12.4 and the subsequent amended reply on 11th August, 2015. It indicated that following the birth of I. in Ireland in May, 2015, Article 20.3 would apply and as the UK had accepted the responsibility for the first named applicant, it was considered that the UK was also responsible for the examination of the second named applicant. The letter concluded with a request of the UK to accept responsibility for the first named applicant and the second named applicant in accordance with Article 12.2 of the 2013 regulations.

10. As aforesaid, the s. 5 interview took place on 5th August, 2015 when the first named applicant attended without legal assistance. This interview was preceded by a letter of 14th July, 2015 to the first named applicant advising her of the date of the interview and asking her to confirm her attendance which she duly did.

11. On 18th August, 2015 the Legal Aid Board sought all documentation concerning the first named applicant and indicated that they had been instructed by her. Such documentation was furnished under cover letter of 24th August, 2015. On 25th August the Legal Aid Board communicated with the first named respondent indicating that the first named applicant believed that she had an Article 5 Interview in relation to the Dublin 3 Procedure at the beginning of August and if there was a take charge request details of same should be furnished. It was further indicated that it was intended to make a separate application for asylum on behalf of the second named applicant and it was submitted that as a result of the second named applicant's application Articles 10 and 16 of the 2013 Regulations were engaged (relative to family members and dependent persons). It suggested that Ireland was the member state responsible for both applications. The letter suggests that Article 10 of the 2013 Regulations is relevant and specific consent on behalf of both applicants was given to Ireland dealing with the application for international protection. The letter concluded with a statement to the effect that as the first named applicant's application for asylum was made in January, 2015 a take charge request should have been made within 3 months and is thus out of time.

12. The possibility of the application of Article 10 of the 2013 Regulations was not developed further in either written or oral submissions and it appears to me that this status is appropriate as the letter of 24th August, 2015 insofar as it refers to Article 10 does not take cognisance of Article 7(2) of the 2013 Regulations which provides:—

> "The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State."

13. It appears to me therefore that in determining which member state is responsible for examining the asylum request, the status as pertained on 14th January, 2015 formed the basis of the determination and on this date the second named applicant was not yet born, the first named applicant had no family member at that time within this jurisdiction and accordingly Article 10 was not engaged. Furthermore and in the events the second named applicant had not in fact made an application for international protection at the date of the letter of 24th August, 2015 but rather that application was subsequently made on 28th August, 2015.

14. In a further letter of 3rd September, 2015 the Legal Aid Board advised that the application on behalf of the second named applicant for international protection had been made. Thereafter an issue was raised as to whether or not correspondence from the Irish authorities had been furnished in full. The letter goes on to state that a take charge request would be out of time and a resubmission of Article 10 and Article 16 of the 2013 regulations was made.

15. The statement of grounds does not include any claim that Article 10 was validly engaged so that Ireland was the responsible member state under Chapter 3. A similar comment arises in respect of Article 16. Furthermore Article 16 does not appear relevant as neither of the applicants has a family member legally resident within this State.

16. The final letter dispatched from the Legal Aid Board before the decision of 10th September, 2015, is dated 4th September, 2015 and in this letter the circumstances of the conception of the second named applicant is detailed. It was indicated that the writer of the letter had concern that the first named applicant may be psychologically vulnerable which vulnerability may have increased following the birth of the second named applicant in May, 2015, and thereafter stated that clearly any psychological vulnerability could have relevance in any proposed transfer of I. A request was made to refrain from making any decision on the file until receipt of a medical report which the letter indicated was awaited.

17. In the events, the grounding affidavit of the first named applicant of 29th October, 2015, and in particular para. 15 thereof, does not support the proposition that at the date of swearing the affidavit that any medical report was in fact awaited, but rather it states that the first named applicant was awaiting counselling at the Rape Crisis Centre and also had an appointment to see a psychologist next month (November, 2015) through a GP referral. In submissions on behalf of the applicants it was indicated that the report referred to in the letter of 4th September, 2015 was now to hand and apparently is dated 16th November, 2016.

The interview and the decision

18. The interview as aforesaid was conducted on 5th August, 2015 and was certainly brief. The applicants' difficulty with the interview process is expressed as Ground no. 3 in the statement of grounds, namely that the applicant was unaware of the purpose of the interview and, further, that the interviewer failed to conduct any enquiry in relation to the best interests of the child during the interview.

19. The only question that appears relevant to the child was question 33 which asked the first named applicant whether or not she had any family member within this jurisdiction to which she responded no.

20. The relevant decision was made on 10th September, 2015. It is a 3-page document and is entitled "Acceptance by the UK under Article 12(2) of the 2013 Regulations in respect of both applicants". Thereafter it proceeds to recite the background history, not in respect of the grounds for seeking international protection, but rather in respect of the take charge application and the subsequent securing of the UK acceptance. Reference was made to the interview on 5th August, 2015 and the birth of the second named applicant on 19th May, 2015. The solicitor's letter of 25th August, 2015 is referenced and the Irish authorities' response to same is included. Thereafter it is indicated that the author examined the applicants' file and all information contained within it had been considered. A quote from the 2013 regulations is included to the effect that all member states are considered as safe countries for third country nationals and further there is a statement to the effect that the European Council concluded that a clear and workable method of determining the member state responsible for examination of asylum applications be established. In the circumstances it concluded with a consideration to the effect that a transfer could not be deemed to give rise to *refoulement*.

Case law relied on

21. The applicants rely on the case of *Meadows v. Minister for Justice* [2010] 2 I.R. 701 to the effect that the query to be posed by

the Court in a judicial review decision is as to whether or not the decision falls foul of principles of law according to which the decision should have been taken.

22. The applicants also rely on the Supreme Court decision of *Stefan v. Minister for Justice* [2001] 4 I.R. 203 to the effect that an appeal is an inadequate remedy if an issue has not been dealt with at first instance.

23. Finally, the applicant relies on the joint cases of *M.A. &c.* — case C – 648/11 (a decision delivered on 6th June, 2013) which indicated that the child's best interests must be a primary consideration in all decisions.

24. The respondents rely on the case of *M.S.* — case C – 411/10 and 493/10 and in particular para. 80 thereof to the effect that it must be assumed that the treatment of asylum seekers in all member states complies with the requirements of the Charter, the Geneva Convention and the European Convention on Human Rights.

25. The respondents also rely on the case of *H.I.D. and B.A.* — case C – 175/2011 (a judgment delivered on 31st January, 2013) to the effect that in international protection Ireland has met the independence of the remedy requirements by virtue of a hearing and appeal and the possibility of judicial review.

26. Finally, the respondents rely on the case of *Buckley v. Kirby* [2003] I.R. 431 to the effect that the Court must pose a query as to whether or not judicial review or appeal is the more appropriate remedy.

A consideration of Regulation 604/2013

27. Both parties accept that as the issues involved in this application involve an interpretation of the 2013 EU Regulation then unless the Court is satisfied that the interpretation is an *acte claire*, then a reference should be made to the EU Court of Justice.

28. Both parties also accept that when considering this regulation, the meaning thereof must be gathered from a consideration of the regulation as a whole rather than a consideration of individual parts looked at separately.

29. The layout of the regulation is to the effect that prior to an enumeration of the relevant articles within the Regulation adopted there are 42 recitals. Thereafter there are 49 articles.

30. Insofar as the recitals are concerned, the following appear to be germane:—

> (1) At Recital No. 1 it is provided that a number of substantive changes are to be made to Council Regulation EC 343/2003 and that regulation should be recast. In fact under Article 48 that regulation is repealed in full.
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> (2) Recital 3 provides that all member states, respecting the principle of non-refoulement, are considered as safe countries for third country nationals.
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> (3) Recital No. 4 states that a clear and workable method for determining the member state responsible for the examination of asylum applications are required — in fact the title of the regulation is "a regulation establishing the criteria and mechanism for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third country national or a stateless person".
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> (4) In Recital No. 5 the method to be adopted should be objective and have fair criteria for determining rapidly the member state responsible so as not to compromise the objective of the rapid processing of applications for international protection.
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> (5) At Recital No. 13 the best interest of the child should be a primary consideration.
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> (6) At Recital No. 14 respect for family life should also be a primary consideration.
>
> (7) At Recital No. 15 it is provided that the processing of applications of members of one family should be consistent and should ensure that the members of the one family are not separated.
>
> (8) At Recital No. 18 it is provided that a personal interview with the applicant should be organised in order to facilitate the determination of the member state responsible for examining the application for international protection.
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> (9) At Recital No. 19 it is provided that an effective remedy against such decision should cover both the examination of the application of the regulation and the legal and factual situation in the member state in which the applicant is transferred.

31. The following articles are relevant to the within matter, namely:—

> a. Article No. 1 which provides that the regulation lays down the criteria and mechanism for determining the member state responsible for examining an application for international protection.
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> b. Article 2 (d) provides that "examination of an application for international protection" means any examination of or decision or ruling concerning an application for international protection by the competent authority.
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> c. Article 3.1 provides that *inter alia* the application for international protection by third country nationals or to stateless persons "shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible."
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> d. In Article 4.1 it is provided that as soon as an application for international protection is lodged within the meaning of Article 20(2) its competent authority shall inform the applicant of the application of this regulation and in particular of the objects of the regulation, the criteria for determining the member state responsible, the personal interview pursuant to Article 5, the possibility of a challenge to the transfer decision, the fact that the competent authority can exchange data and the right of access to data relating to the applicant.
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> e. In Article 5.1 it is provided that in order to facilitate the process of determining the member state responsible, the determining member state will conduct a personal interview with the applicant.

f. Under Article 6.1 the best interest of the child shall be a primary consideration for member states with respect to the procedures provided for in the regulation and in assessing that best interest it is provided at Article 6.3 that in particular the following matters should be taken into account, namely family reunification, the minor's wellbeing and social development, safety and security considerations and the views of the minor.

g. Article 7 — Article 15 set out the criteria for determining the member state responsible and under Article 12.2 thereof it is provided that where the applicant is in possession of a valid visa, the member state which issued the visa shall be responsible for the examination.

h. Article 17 is headed as a discretionary clause and provides that:—

> "By way of derogation from Article 3(1), each member state may decide to examine an application for international protection lodged with it by a third country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation."

i. Article 20 sets out the procedure for taking in charge and taking back and under Article 20.1 the process shall start as soon as an application for international protection is first lodged. Under Article 20.3 it is provided:—

> "For the purposes of this Regulation, the situation of a minor who is accompanying the applicant and meets the definition of family member shall be indissociable from that of his or her family member and shall be a matter for the member state responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor's best interest. The same treatment shall be applied to children born after the applicant arrives on the territory of the member state without the need to initiate a new procedure for taking in charge of them."

j. Article 21 lays down time limits for taking charge requests and the requests must be made within 3 months of the date of the application for international protection and in any event within 2 months of receiving a hit from Eurodac. It is also provided that where the request to take charge is not made within the period laid down, then it is the responsibility of the member state in which the application is lodged to examine the application. Under Article 21.3 it is provided that the request to take charge shall be made using a standard form.

k. Under Article 22.7 it is provided that failure to act within the 2 month period mentioned in para. 1 dealing with the replying to the take charge request shall be tantamount to accepting the request.

l. Under Article 29 the transfer of the applicant shall be within 6 months of the acceptance of the request by the member state to take charge of same.

m. Under Article 31, the personal data of the applicant may be transmitted for the purposes of ensuring adequate assistance including immediate healthcare. This information shall be furnished within a reasonable period of time before the transfer is carried out so as to ensure sufficient time to take the necessary measures by the receiving member state.

n. Under Article 32.1 it is also provided that for the sole purpose of the provision of medical care, in particular relative to *inter alia* victims of rape, a member state transferring the applicant shall transmit to the receiving member state any special needs of the person to be transferred.

Discussion

A - Interview

32. The interview process is impugned by reason of the failure of the first named respondent to inform the applicant of the purpose of the interview and the failure to conduct an inquiry as to best interest of the child during same.

33. Prior to the interview of 5th August, 2015 a letter was dispatched to the first named applicant bearing date 14th July, 2015 which was clearly received by her and apparently understood by her as she did confirm that she would attend the interview by using the confirmation slip attached. The letter advises of details of where the applicant might secure legal advice or assistance in relation to the application. An information leaflet was furnished and the applicant was requested to read same carefully. Included in the documentation furnished was an information note on the EU Dublin Regulations 2013 (the relevant regulation under consideration). Furthermore the penultimate paragraph advises the applicant that if information becomes available that another member state is responsible for the applicant's application for international protection under the 2003 and 2013 regulations the interview will be conducted in accordance with such regulations and it is indicated that the purpose of the regulations is to provide the mechanism for determining the state responsible for an examination of the application for international protection.

34. The first named applicant attended for the interview on 5th August, 2015. It is clear from the title that the interview was conducted in accordance with Article 5 of the within 2013 regulation. The record of the interview took 3 pages. Prior to any query being posed of the first named applicant it was indicated that she was going to be asked questions about any visas which she may have had in any other country and the purpose of the interview was not to examine her claim for asylum. Thereafter she was advised that the Irish authorities had received information that she was issued with a visa for the UK. As previously mentioned, at para. 33 she was asked were there any members of her family in Ireland to which the applicant answered no.

35. The respondent highlighted the fact that the first named applicant is university educated, speaks English and did not require an interpreter and previously processed two visa applications.

36. In my view the foregoing demonstrates that the first named applicant was in fact advised in advance of the interview of 5th August, 2015 as to the purpose of the interview, namely in the letter of 14th July, 2015 and by virtue of the explanation furnished to her immediately in advance of queries being posed of her during the interview process.

37. Insofar as the applicants complain that the interview did not conduct an inquiry as to the best interests of the child during the interview process, Article 5 of the 2013 Regulation is relevant in that it provides:—

> "In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4."

38. I am of the view that reading the regulation as a whole the purpose of the interview under Article 5 is to assist in determining the member state responsible. This is a fact finding exercise as to whether or not one or more of the articles within Chapter III applies. Given the provisions of Article 5 and having regard to the fact that the second named applicant was at the time of the interview 3 months old and bearing in mind Recitals 13 — 15 aforesaid and further having regard to the fact that on 5th August, 2015 no representation whatsoever was made concerning the infant child, the interview process does not breach either fair procedure or EU law.

B – Take Charge Request
39. The applicants assert that the take charge request was made out of time. For this argument to succeed the request of 13th August 2015 should be considered the relevant request and the request of 14th April, 2015 should be considered as waived, abandoned or spent.

40. I am satisfied that in the instant circumstances the relevant take charge request was that of 14th April, 2015 and in this regard I have paid particular attention to

> (a) the fact that the request of 14th April, 2015 was in the standard form as required by the Regulation whereas the amended request of 13th August, 2015 was not;
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> (b) in the letter of 13th August, 2015, the first paragraph thereof refers to the take charge request of 14th April, 2015 and accordingly can not be considered to be any form of substitution for the take request of the 14th April, 2015 and indeed by asking for amendments by definition reliance is being placed on the request of 14th April, 2015;
>
> (c) the second sentence within Article 20.3 provides that the take charge request of the second named applicant in the circumstances can be made without the need to initiate a new procedure for taking charge;
>
> (d) the request of 14th April, 2015 was correct in every respect and such a correct request cannot be said to have been vitiated by reason of an error or errors within the response of the UK in their letter of 12th May, 2015.
>
> (e) although there is no reference to amending requests within the regulation, the amendments sought accord with the 2013 regulation as a whole and address the error or errors contained in the acceptance response of the UK of 12th May, 2015 and the factual development which occurred between the initial request of 14th April, 2015 and the amended request of 13th August, 2015, namely the birth of the second named applicant on 19th May, 2015.

41. I am satisfied therefore that the take charge request was made on 14th April, 2015 and was within time.

C – The Decision
42. The final ground relied upon by the applicants to impugn the decision of 10th September, 2015 is to the effect that this decision failed to conduct any assessment of or determination in relation to the best interest of the child prior to making the decision to transfer. In this regard the applicants' submissions are to the effect that Article 20.3 of the Regulation requires an express examination to ascertain if it is in the best interests for the minor to stay within this jurisdiction and if that examination is to the effect that the minor should stay then the mother should also stay.

43. Aside from the sentence dealing with the fact that the same treatment shall be applied to children born after the applicant arrives within the State without the need to initiate a new procedure, Article 20.3 is in one sentence. Accordingly when assessing within that sentence the minor's best interest, this refers to whether or not the situation of the minor should be considered indissociable from inter alia the mother. I am satisfied that the meaning contended for by the applicants cannot be read into Article 20.3 which is to the effect that the best interests of the child mentioned in Article 20.3 amount to a derogation or potential derogation from Article 3.1. In this regard I am satisfied that having regard to Article 17 which clearly is a derogation from Article 3.1 as it expressly states, if it was intended that Article 20.3 might also be a derogation from Article 3.1 it would have expressly stated so.

44. The applicants further complain that there is no reference to the best interest of the minor within the decision of 10th September, 2015. The decision did identify the date of birth of the second named applicant and as aforesaid did deal with the representation made on the applicants' behalf by letter of 25th August, 2015. The decision did not make any reference to the submissions made in the letter of 4th September, 2015 which, as aforesaid suggested that the first named applicant may be psychologically vulnerable and such vulnerability may have increased following the birth of the second named applicant and further indicates that there might be a risk of increased psychological vulnerability due to the proposed transfer.

45. Assuming that the first named applicant was so psychologically vulnerable and that same would have an impact on the second named applicant, this in my view does not give rise to a derogation from the provisions of Article 3.1, having regard to 2013 regulation as a whole. There is nothing contained within the regulation to suggest that psychologically vulnerable persons are not the subject matter of the regulation and in fact, reading the regulation as a whole, same does anticipate a transfer under the provisions thereof of disabled persons, elderly people, pregnant women, minors, and persons who have been subjected to torture, rape or other serious forms of psychological, physical and sexual violence.

46. There is nothing contained in any of the representations to suggest that the situation of the second named applicant should be dissociable from that of the first named applicant.

47. Notwithstanding that, there might be a variety of different circumstances in which a minor child's situation should be dissociable from that of the minor's parent, in the circumstances of the within matter and in particular the fact that the second named applicant was four months old when the decision was taken, there is no basis to suggest that the second named applicant's situation should be dissociable from his mother.

48. I accept the applicants' contention that the respondent's submission to the effect that the letter of 13th August, 2015 from the Irish authorities to the UK authorities cannot be considered to be part of the decision of 10th September, 2015, nevertheless, the decision of 10th September, 2015 indicates that the author examined the applicants' file "and all information contained within it has been considered". Accordingly, therefore, consideration was given to the fact that the second named applicant's father was not identified in the birth certificate.

Conclusion
49. I am satisfied that the interpretation of Article 20.3 of Regulation No. 604/2013 cannot support the contention made on behalf of the applicants in this matter.

50. I am further satisfied that it is *acte claire* that the applicants' arguments cannot succeed.

51. For the reasons set out herein, the applicants' application for *certiorari* is refused.