

**THE HIGH COURT
JUDICIAL REVIEW**

[2015 No. 374 J.R.]

BETWEEN

T. A. J.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

AND

THE REFUGEE APPLICATIONS COMMISSIONER

NOTICE PARTY

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 16th day of November 2015.

1. This is an application for an interlocutory injunction to restrain the second named respondent from transferring the applicant to the United Kingdom. The underlying proceedings challenge the decision of the Refugee Appeals Tribunal which affirmed the decision of the notice party that the United Kingdom was responsible for dealing with the applicant's application for international protection pursuant to the terms of art. 12(4) of Regulation (EU) No. 604/2013, known as the Dublin III Regulation.

2. Leave to apply for judicial review was granted following an *ex parte* application to this Court on the 6th July, 2015, and an interim injunction was granted restraining the transfer of the applicant to the U.K. on that date.

3. The applicant is a Bangladeshi national who sought asylum from the notice party on the 20th October, 2014. The notice party conducted a Eurodac fingerprint search at about this time which revealed prior asylum history in other Member States. On his ASY 1 form he stated that he had never applied for asylum in any other country before his journey to Ireland from Bangladesh which he said involved flying to an unidentified country and arriving in Ireland in a van at a port unknown to him. He said he travelled on false documentation provided by a trafficker.

4. He completed a refugee status questionnaire on the 26th October, 2014, and made statements to the effect that he had never travelled outside his country of origin before travelling to Ireland, that he had never had a passport and that he had never been granted a visa for any other country. He further stated that he had left his country of origin on the 14th October, 2014, that he did not know the countries through which he travelled and that he had never resided in any other country. He said that all the information provided by him on the questionnaire was accurate.

5. The notice party made a request for information addressed to the relevant U.K. authorities on the 5th December, 2014. The request was said to have been made pursuant to art. 34 of the Dublin III Regulation. The response to the request came by letter dated the 2nd January, 2015, and is in the following terms:-

"Re: Tausif AZHAR – DoB 30/09/1995 – Nationality: Bangladeshi

Dear Colleagues

A person with the following details did match with records on both our Fingerprint and on our Visa Central Records Systems:

NAME: Tausif Azhar JILLAN

DATE OF BIRTH: 30/09/1995

NATIONALITY: Bangladeshi

VISA TYPE APPLIED FOR: Multi-Tier 4(GENERAL) student

VAF NUMBER: 629207

PASSPORT NUMBER: AD6985881

POST NAME: DHAKA (BHC)

I am able to confirm the following:

On 10th February 2013 the applicant applied for the above visa to study at the Gower College, Swansea in Wales to study for an HND in Business. Visa issued on 03 March 2013 and expires on 31 May 2015.

But, the college stopped sponsoring the student. He completed Level 1 of his HND but failed to enroll for his HND Level 2. Leave Curtailed under paragraph(s) 323A(a)(ii)(2) and paragraph 323(ii) where the student has stopped

attending/deferred their course. His leave expired on 02/05/2014.

There is no evidence that he applied for international protection or asylum whilst in this country. As there is no record that this applicant was removed by the U.K. authorities, it has to be assumed that he left this country on a voluntarily basis (sic).

I hope you find this information useful.

Regards,

Trevor Charlton

Third Country Unit/IN-CASES"

6. In view of the information supplied by the U.K. authorities the notice party issued a "take back" request on the 19th January, 2015, pursuant to art. 12(2)/12(3) of the Dublin III Regulation on the basis that the applicant had a valid visa for the United Kingdom until the 31st May, 2015.

7. The notice party interviewed the applicant on the 29th January, 2015, in accordance with art. 5 of the Dublin III Regulation. The applicant accepted during the interview that the information provided by the U.K. Visas and Immigration Unit was correct.

8. The take back request was accepted by the U.K. authorities on the 13th February, 2015, pursuant to the provisions of art. 12(4) of the Dublin III Regulation. This article provides that where, at the time of an application for international protection, the applicant is in possession of a residence permit which expired less than two years previously or where a visa which expired less than six months previously and which permitted the applicant to enter the territory of the Member State in question, the Member State issuing those permissions is the responsible State for processing the application for asylum. The applicant was informed by letter dated 24th April, 2015, by the notice party that his asylum claim would be transferred to the U.K.. An appeal was filed by the applicant to the R.A.T. on the 12th May, 2015. The appeal was rejected by decision dated 10th June, 2015, and the transfer order affirmed. The applicant was notified of the decision by letter dated 10th June, 2015.

9. The essential complaint made in these proceedings is that the information obtained from the U.K. authorities was unlawfully acquired because:-

- (1) there was no factual basis for the information request to be sent pursuant to art. 34 of the Dublin III Regulation,
- (2) the request was sent in breach of art 34.4 of the Dublin III Regulation in that it did not set out the grounds on which it was based and it did not state what evidence it was based on.
- (3) this unlawful request led to a reply in breach of Directive 95/46/EC ("Data Protection Directive")

10. In addition it is argued that the request and reply were both sent in breach of art. 38 of the Dublin III Regulation and that they breached the rule that security of personal data should be observed by Member States and breached European Union and Irish rules on the processing of data more generally.

The Dublin III Regulation, the Irish implementing rules and suspensive measures:

11. The applicant argues that the combined effect of arts. 27 and 29 of the Dublin III Regulation and of national implementing measures prevents the respondent from transferring the applicant to the U.K. for the duration of these judicial review proceedings. Article 27 of the Regulation provides as follows:-

- "1. The applicant... shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.
2. Member States shall provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.
3. For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:
 - (a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review: or
 - (b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or
 - (c) The person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based."

12. Article 29(1) of the Dublin III Regulation provides as follows:-

- "1. The transfer of the applicant... from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3)."

13. In view of the wording of art. 29(1) the applicant argues that Ireland was required to transfer him to the United Kingdom at the latest within six months of acceptance by the U.K. of the request. On the applicant's case, that six month period expired on the 13th August. I reject this argument. In accordance with the choice available to Member States under art. 27(3)(a), Ireland adopted the (European Union) Dublin System Regulations 2014 (S.I. No. 525 of 2014) which provides at regulation. 6(1) that:-

"An applicant may appeal to the Tribunal, in fact and in law, against a transfer decision."

and regulation. 7(1):-

"An applicant who appeals under Regulation 6 shall, subject to paragraph (2), be entitled to remain in the State pending the outcome of the appeal."

Thus appeal to the R.A.T. of the transfer order had suspensive effect and the six month period within which the order must be implemented only begins to run from the date of the final decision of the R.A.T. which was 10th June, 2015. It is incorrect to say that the transfer was required to be effected before 13th August, 2015.

14. The applicant also argues that these judicial review proceedings constitute a review within the meaning of art. 27(1) and thus the existence of these proceedings prevent the transfer from taking place because of the alleged automatic suspensive effect of the proceedings.

15. My view is that the applicant has advanced a misconceived interpretation of arts. 27 and 29 of the Dublin III Regulation. Article 27(1) requires Ireland to provide an effective remedy against a transfer decision. The effective remedy may be in the form of, either an appeal, or of a review. The effective remedy must permit an appeal or a review in fact and in law. The effective remedy must be available before a court or tribunal. In establishing the Refugee Appeals Tribunal as the body which shall provide the effective remedy required by art. 27(1), no failure in transposition has occurred. The Irish regulations provide for a full appeal in fact and in law to the R.A.T.. No part of regulation 27(1) requires Ireland to provide in addition to an appeal or a review a further level of appeal or review. Thus, the availability in Ireland of judicial review to challenge a decision on an appeal is not a requirement of European Union law but purely a matter of domestic law provision. The applicant's argument rests on the unattractive proposition that the wording in art.27(1) ("appeal or review") requires Member States to provide both an appeal of a first instance decision and a (judicial) review of that first instance decision, together with a (judicial) review of that appeal decision and that all these procedures automatically suspend the transfer order. It would offend the ordinary meaning of words to read the words "appeal or review" as " appeal and review".

16. During the course of the appeal of the transfer order to the Refugee Appeals Tribunal against the decision of O.R.A.C., the transfer order was suspended. Given that there is no requirement in E.U. law to provide a further level of scrutiny following an appeal, no rule of European Union law requires Ireland to ensure that where such extra level of review is provided automatic suspensive effect must accompany that process.

17. My view is that these judicial review proceedings are not a creature of E.U. law and are not required by E.U. law to have automatic suspensive effect.

18. In those circumstances this application for interlocutory injunction proceeds in the ordinary way and falls to be determined in accordance with the decision of the Supreme Court in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 which provides guidance on interlocutory applications to restrain deportations. No reason in principle exists as to why the dicta in *Okunade* does not have equal application with respect to transfer orders. The *ratio decidendi* of *Okunade* – that prima facie valid orders of the State relating to border control should be implemented – applies equally to transfer orders and deportation orders.

19. I have not detected any circumstance in this case which would justify departure from the default position identified by the Supreme Court (at para. 110 of the decision in *Okunade* as reported in the Irish Reports) which requires implementation of orders such as these which are *prima facie* valid. The high point of the applicant's argument in favour of an injunction (other than the rejected Dublin III arguments) is that he wishes his asylum claim to be processed in Ireland. This of itself, of course, would not be sufficient reason to prevent the implementation of a transfer order. It is difficult to imagine irreversible adverse consequences for the applicant should his claim be assessed by the U.K. authorities. The Irish and the British rules for assessing such claims derive from the same *corpus* of international law. Ireland, the U.K. and the other Member States operate a common European asylum system. I cannot see how harm will be caused to the applicant by the fact that his asylum claim will be determined in the U.K.. No circumstance relating to the applicant upsets the default position that the transfer order should be implemented.

20. I refuse this application for an interlocutory injunction.