[2019] IEHC 624

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 968JR]

BETWEEN

P.F.

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

AND

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 918 JR]

BETWEEN

P.F.

APPLICANT

AND

THE INTERNATIONAL PROTECTION OFFICER,

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND & THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice David Keane delivered on the 21st August 2019

Introduction

1. There are two sets of proceedings before the Court.

2. The first set of proceedings, bearing the record number 968JR of 2016, is the judicial review of a decision of the Refugee Appeals Tribunal, now the International Protection Appeals Tribunal, ('the tribunal'), dated 2 November 2016 and made under Reg. 8(22)(a) of the European Union (Subsidiary Protection) Regulations 2013 ('the 2013 Regulations'), then applicable, affirming a recommendation of the Refugee Applications Commissioner that the applicant should not be declared to be a person eligible for subsidiary protection ('the IPAT decision'). I will refer to those as the 2016 proceedings.

3. At the time when leave was first sought in the 2016 proceedings, the International Protection Appeals Tribunal was known as the Refugee Appeals Tribunal. When s. 71(5) of the International Protection Act 2015 ("the Act of 2015") came into force on 31 December 2016, the former was substituted for the latter in these proceedings by operation of law.

4. The second set of proceedings, bearing the record number 918JR of 2017, is the judicial review of the decision of the International Protection Office ('the IPO'), set out in a letter dated 31 July

2017, denying that the State has a discretion under Art. 17(1) of *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member States responsible for examining an application for protection lodged in one of the Member States by a third-country national or a stateless person (recast) ('the Dublin III Regulation')* to reassume responsibility for the examination of the international protection application of the applicant.

5. The State was no longer responsible for the examination of that international protection application because the applicant had left the State unlawfully and then entered the United Kingdom unlawfully at some point in 2016, where police officers encountered her at a residential address in Hampshire, England, on 18 June 2016, following which she was detained for several weeks. Since her release, the applicant has been residing at an address in Perthshire, Scotland. The UK Home Office made a 'take back' request to Ireland on 22 June 2016. The Office of the Refugee Applications Commissioner ('ORAC', as it was then known) wrote to the Home Office on 5 August 2016, acceding to that request. However, the transfer of the applicant did not take place within the following six-month period and no request was made during that period for any extension of time to effect that transfer. Hence, on 8 February 2017, the IPO (as ORAC had become) wrote to the Home Office to confirm its understanding that, in accordance with the terms of Art. 29(2) of the Dublin III Regulation, responsibility for examining the international protection application of the applicant had been transferred to the United Kingdom.

6. When both sets of proceedings came on for hearing together before me, the parties agreed that the 2017 proceedings should be heard and determined first since, depending on the outcome, they have the potential to render the 2016 proceedings moot.

Background

7. The applicant is a national of Zimbabwe who applied for asylum in the State in on 10 May 2011. The Commissioner reported on 22 July 2011, recommending that that applicant should not be declared a refugee. That negative recommendation was affirmed on appeal by the tribunal on 8 May 2012. The Minister issued a decision to refuse a declaration of refugee status to the applicant on 20 June 2012.

8. In accordance with the two-stage international protection application process then in operation, the applicant lodged an application for subsidiary protection on 11 July 2012.

9. On 21 May 2014, the applicant was detained at Belfast City Airport while en route to Southampton in Hampshire, England. She had not applied for, and did not have, a visa to enter the United Kingdom, nor had she been granted permission to be in that jurisdiction. Ireland accepted the applicant back and she returned on 28 May 2014.

10. The Commissioner reported on 7 July 2015, recommending that the applicant not be declared eligible for subsidiary protection. The applicant appealed that recommendation on 12 August 2015 and attended an oral hearing before the tribunal on 3 May 2016. The tribunal affirmed the negative recommendation on 2 November 2016.

11. While the relevant Order of the Court has not been produced to me, I understand that, on an unspecified date in December 2016, O'Regan J deemed the application for leave to bring the 2016 proceedings to have been opened before adjourning that leave application generally at the request of the applicant's counsel due to the applicant's absence from the jurisdiction. The applicant's statement of grounds, dated 15 December 2016, was filed on that date. It is grounded on an affidavit of the applicant's solicitor, sworn on 15 December 2016. I gather that Humphreys J subsequently granted leave on 6 November 2017, although I have not been shown that Order either. The applicant swore an affidavit in support of her application on 18 January 2018. The respondents filed their statement of opposition, dated 2 February 2018, on that day. It is supported by an affidavit of John Moore, a higher executive officer in the Irish Naturalisation and Immigration Service ('INIS'), sworn on 8 February 2018.

12. In the meantime, as already described, the Hampshire police had encountered the applicant at a residential address in that English county on 18 June 2016, which resulted in her detention at Yarl's Wood Immigration Removal Centre, Bedfordshire, until her release on 2 August 2016 on condition that she reside at an address in Perthshire, Scotland that she had provided details of to

the Home Office authorities. In a letter to the applicant, dated 29 November 2016, the Home Office noted that the applicant had stated to Hampshire police on the day of her arrest that she had a sister in Southampton and that she had arrived in that city in February 2016.

13. In the affidavit that the applicant swore in the 2016 proceedings on 18 January 2018, she averred that, when detained in Belfast in 2014, she had been attempting to visit her Irish citizen partner who was then working in London and with whom she now resides in Perthshire. The applicant averred that they met in 2013 and subsequently maintained a long-distance relationship. Though much more obviously susceptible to objective proof than the various elements of the applicant's international protection claim, those averments are uncorroborated. The applicant has offered no explanation for her presence in Hampshire in 2018 (or for her decision to travel to London by way of Hampshire in 2014), nor has she addressed the assertion that she told Hampshire police in June 2016 that she had a sister living in Southampton and had arrived there in February 2016. In so far as I am being asked to attribute evidential weight to the applicant's averments, it does not seem unreasonable to take judicial notice of the fact that Hampshire and Perthshire are over 600 km apart, or that Southampton is approximately 100 km from London, which does not lack for airports of its own.

14. The reasons for the applicant's unlawful departure from the State and unlawful entry into, and residence in, the United Kingdom are not strictly relevant to the question of law that I must decide in the 2017 proceedings. However, insofar as the applicant puts forward those claims to support the argument that her personal reasons for unlawfully leaving the State amount to humanitarian considerations in favour of the exercise by the State of the discretion that she contends remains available to it under Art. 17 of the Dublin III Regulation to reassume responsibility for the examination of her application for international protection, they are potentially material to that extent.

15. As already described, the UK Home Office made a 'take back' request on 22 June 2016. ORAC wrote to the Home Office on 5 August 2016, acceding to that request. However, the transfer of the applicant did not take place within the following six-month period and the Home Office made no request during that period for any extension of time to effect it. Thus, on 8 February 2017, the IPO wrote to the Home Office to confirm its understanding that, in accordance with the terms of Art. 29(2) of the Dublin III Regulation, responsibility for examining the international protection application of the applicant had been transferred to the United Kingdom.

16. In letters dated 7 and 24 March, 21 April and 21 July 2017, the applicant's solicitor called upon the State, through the IPO, to exercise its discretion under Art. 17 of the Dublin III Regulation to take responsibility (once again) for the examination of the applicant's international protection application.

The decision under challenge in the 2017 proceedings

17. The IPO addressed that request in a letter dated 31 July 2017 ('the decision'). The letter stated, in material part:

> 'Article 17(1) envisages the person being present in the jurisdiction exercising the discretion. That is not the position in this case. In fact your client left the Irish jurisdiction without the permission of the Minister as required and launched another protection application in the United Kingdom. That country has now become the Member State responsible for processing the application and any utilisation of the discretionary Article 17(1) or request under Article 17(2) is a matter for it to exercise.'

18. The respondents acknowledge that the statement in that letter that the applicant had made another protection application in the United Kingdom was incorrect.

Procedural history of the 2017 proceedings and grounds of challenge

19. The application is based on an amended statement of grounds, dated 16 February 2018, supported by an affidavit of the applicant's solicitor, sworn on 23 November 2017.

20. By Order made on 27 November 2017, Humphreys J granted the applicant leave to seek judicial review and, by further Order made on 22 January 2018, the same judge permitted the addition of Ireland and the Attorney General as respondents to the application and the

consequential amendment of the statement of grounds. I gather that, in December 2017, Humphreys J directed that the 2016 proceedings and those proceedings should be linked and that they should travel together.

21. The Minister filed a statement of opposition, dated 2 February 2018, on that date. It is supported by a verifying affidavit of Sean Dooley, a higher executive officer in the IPO, sworn on 8 February 2018.

Issues

22. Very helpfully, the written legal submissions filed on behalf of the applicant, identify the following three grounds as the basis of the applicant's challenge to the decision:

> (a) Ireland has erred in law and in fact in reaching a finding that it does not have jurisdiction to exercise its discretion pursuant to Article 17 where the Applicant is not present in its territories.
>
> (b) Ireland has acted in breach of the Dublin III Regulation in failing to consider whether it will accept a transfer of the Applicant into the state.
>
> (c) Ireland has acted in breach of law, its obligation pursuant to Article 35 and in breach of the Applicant's right to fair procedures and right to transparency in failing to have in place a designated system and/ or mechanism through which Ireland can exercise its discretion under Article 17, and in failing to publish and/ or notify concerned applicants of such system.

23. The respondent joins issue with the applicant on each of those grounds.

The Law

24. Section 9(4) of the Refugee Act 1996, as amended ('the Act of 1996'), which was the statute in force when the applicant left the State in 2014 and 2016, states, in material part:

> 'An applicant shall not –
>
> > (a) leave or attempt to leave the State without the consent of the Minister.'

25. Section 9(7) provides:

> 'A person who contravenes subsection 4... shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or to imprisonment for a term not exceeding one month or both.'

26. Article 17(1) in Chapter IV of the Dublin III Regulation provides in material part:

> '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.'

27. Article 3(1) in Chapter II of the Dublin III Regulation states:

> 'Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.'

28. The criteria in Chapter III of the Dublin III Regulation are governed by a hierarchy defined in Art. 7 and are set out in Arts. 8 to 15 inclusive.

29. Chapter VI of the Dublin III Regulation is headed 'Procedures for Taking Charge and Taking Back'. Section VI of Chapter VI is headed 'Transfers' and contains Art. 29. Art. 29 is headed 'Modalities and time limits' and states in material part:

> '1. The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) 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).
>
> ...
>
> 2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds.'

Analysis

30. The applicant contends that, on the proper interpretation of Art. 17(1), there is no impediment to a decision by Ireland to reassume responsibility for the examination of the application for international protection that she lodged with it, even if that examination is no longer its responsibility by operation of the time limits fixed by Art. 29.

31. The problem with that argument is that it ignores the qualifying words 'By way of derogation from Article 3(1)' at the commencement of Art. 17.

32. Once those words are considered, two difficulties with the interpretation contended for by the applicant are immediately apparent.

33. The first is that, if Ireland invoked Art. 17(1) to take back responsibility for the examination of the applicant's international protection claim, it would be reassuming its responsibility to do so under Art. 3(1), not derogating from that article.

34. The second difficulty is the obverse of the first. It is that the responsibility of the United Kingdom to examine the applicant's claim for international protection is not one that it assumed under Art. 3(1), from which Ireland might then derogate under Art. 17(1). The United Kingdom was fixed with responsibility to examine that claim by operation of the relevant time-limit in Art. 29 in Chapter VI, which – if it can be properly characterised as a 'criterion' at all – is certainly not one of the criteria in Chapter III, recognised in Art. 3(1).

35. The question then becomes whether the application of the principles governing the interpretation of European Union law, summarised in cases such as Case 283/81 CILFIT [1982] ECR 3415, nonetheless require the result for which the applicant contends. While no submission was made to me concerning the different language versions of the Regulation or any specific Union law terminology contained in it, it did seem that, at least by implication, the applicant advanced the argument that this is the effect of Art. 17, considered in its context and interpreted in the light of the provisions of Union law as a whole, regard being had to the objectives of that law and to its state of evolution at the date on which the provision in question is to be applied.

36. In advancing that argument, the applicant prays in aid, implicitly if not expressly, the following analysis from Hailbronner and Thym, *EU Immigration and Asylum, A Commentary,* 2nd ed. (2016) (at p. 1533-4):

> 'The discretionary clauses of Article 17 – the 'sovereignty clause' of paragraph 1 and the 'humanitarian clause' of paragraph 2 – have in one form or another been part of the Dublin System since its inception. Far from being an extraneous element, they are a crucial component thereof: they are meant to allow the rigidities of the 'ordinary rules' to be overcome and to ensure that the system is implemented at all times in keeping with its principles and objectives as expressed, in particular, by the preamble. Indeed, in some cases, applying the

> discretionary clauses may be the best or even the only way to ensure e.g. that the applicant has quick access to status determination procedures (recital 5), to heed basic considerations of solidarity between Member States (recital 25), particularly when one of them is subject to particular pressure and its asylum system is threatened by 'collapse' (see recitals 21-23) or to respect 'primary considerations' such as respect for family life or the best interest of the child (recitals 13-16). The preamble lays particular stress on the use of the discretionary clauses 'on humanitarian and compassionate grounds.' (recital 17).'

37. The applicant lays particular emphasis on the fact that she was approaching the end of the examination process in Ireland (and, indeed, subsequently reached that point, subject only to the proceedings she has brought to challenge the decision to affirm the refusal of subsidiary protection), to argue that the interpretation for which she contends would, in the words of recital 5, assist in 'the objective of the rapid processing of applications for international processing' and, in the words of recital 25, assist in striking 'a balance between responsibility criteria in a spirit of solidarity'.

38. However, it seems to me that those aims and objectives are at least as well served by giving both Art. 17(1) in Chapter IV and Art. 29 in Chapter VI their plain and obvious meaning. In that way, the necessary flexibility in the application of the criteria under Chapter III is maintained, but the requirement upon Member States to address their obligations under the transfer provisions of Chapter VI with appropriate celerity and in a spirit of solidarity is not weakened or undermined.

39. In my judgment, that conclusion is perfectly consistent with the observation of the European Court of Justice in Case C-528/11 *Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* ECLI:EU:C:2013:342 (at para. 37) that the Commission proposal that led to the adoption of *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* ('the Dublin II Regulation') that Art. 3(2) of that Regulation – the direct precursor of Art. 17(1) of the Dublin III Regulation – was introduced in order to allow each Member State to decide sovereignly, for political, humanitarian or practical considerations, to agree to examine an application for asylum even if not responsible under the criteria in the Regulation. Article 3(2) of the Dublin II Regulation contained the same qualification as Art. 17(1) of the Dublin III Regulation, in that it was stated to be a derogation from paragraph 1, which identified the relevant criteria for identifying the Member State responsible for examining an asylum application as those set out in Chapter III of that instrument. Article 20(2) in Chapter V of the Dublin II Regulation contained a time-limit directly equivalent to that in Art. 29(2) of the Dublin III Regulation.

40. Finally, there was some debate in the course of the hearing about the relevance and significance, if any, of the decision of the England and Wales Court of Appeal in *R (on the application of RSM) v Secretary of State for the Home Department* [2018] EWCA Civ 18, [2018] 1 WLR 5489. In the event, I do not think it is on point. The applicant has pleaded and argued at some length, that the statement in the IPO letter of 31 July 2017 that 'Article 17(1) envisages the person being present in the jurisdiction exercising the discretion' establishes an error of law, insofar as it suggests that the respondents' position is that the presence of the applicant for protection in the jurisdiction is a necessary precondition to the exercise of that discretion. However, the respondents have made it clear in argument, if not in paragraph 13 of their statement of opposition, that they do not contend for any such rule or principle.

41. In summary, in my judgment the sovereign clause of Art. 17(1) of the Dublin III Regulation applies as a derogation from Art. 3(1), which requires an application for international protection to be examined by the Member State that the criteria set out in Chapter III indicate is responsible. It does not apply as a derogation from the express attribution of responsibility to a requesting Member State under Art. 29(2) where the transfer of the person concerned has not taken place within the time-limit of six months from the acceptance of a transfer request fixed under that provision.

42. It follows from that conclusion that:

(a) there was no error of law by the IPO in its determination that the exercise of the discretion under Art. 17(1) of the Dublin III Regulation did not arise after February 2017;

(b) Ireland has not acted in breach of the Dublin III Regulation in failing to consider whether to accept the transfer of the applicant into the State after February 2017; and

(c) for those reasons, no issue concerning the policy or procedure under which Ireland exercises the discretion under Art. 17 of the Dublin III Convention arises for determination in this case.

Conclusion

43. The application in the 2017 proceedings for judicial review of the decision of the IPO, set out in the letter dated 31 July 2017, is refused.

44. In the circumstances, the decision in the 2017 proceedings renders moot the 2016 proceedings, challenging the decision of the tribunal of 2 November 2016, in that there is no longer any live controversy concerning the examination of the applicant's international protection claim in Ireland, as the examination of that application is now the responsibility of the United Kingdom. Thus, in application of the principles identified by the Supreme Court in *Lofinmakin v Minister for Justice, Equality and Law Reform* 4 IR 274 (at 293) and *Goold v Collins* [2005] 1 ILRM 1, I conclude that the relevant controversy is no longer justiciable and, accordingly, I dismiss those proceedings also.