THE HIGH COURT

JUDICIAL REVIEW

[2017 No.120 J.R.]

BETWEEN

U.

APPLICANTS

AND

REFUGEE APPEALS TRIBUNAL

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 26th day of June, 2017

Issues

1. The applicants in the within proceedings seek to impugn the decision of the first named respondent of 24th January 2017 whereby the first named respondent, on appeal, confirmed the prior decision of ORAC, of 29th April 2016, to transfer the applicants application for asylum to another Member State, namely the U.K.

2. The proceedings involve an interpretation of Dublin III, being Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26th June 2013, and Statutory Instrument No. 525 of 2014 (European Union (Dublin System) Regulations 2014).

3. The issues arising might be conveniently divided into three brackets namely:

1. The provisions of Article 17 of Dublin III;

2. Private life or family life rights arising under Article 8 of the Charter of Human Rights and

3. The best interest of the children.

4. This judgment is confined to the Article 17 issues.

5. Following the initial Statement of Grounds the applicant has since amended the Statement of Grounds without further leave in that regard being afforded. This arose because in the statement of opposition on behalf of the respondents of 25th April 2017 the respondents argue that the discretion arising under Article 17 of Dublin III is in fact vested in the Minister for Justice, Equality and Law Reform as opposed to ORAC (or, currently, the International Protection Agency) which the applicants argue is an about turn on the part of the respondents which could not have been anticipated prior to the filing of the statement of opposition. The respondents in turn filed an amended statement of opposition of the 24th May 2017. For the purpose of disposing of the real issues between the parties all amendments were before the Court in or about the hearing of the matter.

Brief background

6. The applicants are nationals of Pakistan. The first named applicant is the mother of the three infant children mentioned in the title and married their father in 2003. The father of the three children arrived in the United Kingdom in or about 2009 or 2010 and following same the first named applicant made an application for a U.K. spousal visa which was granted to her, valid from the 30th January 2014 to 29th May 2015. The applicants left Pakistan on 7th May 2014 for the United Kingdom. Subsequently the applicants left the United Kingdom and arrived in Ireland on 5th June 2015 and immediately made an asylum application. It is common case that no asylum application or no reporting to any authority was made by the first named applicant while in the United Kingdom. The applicant complained that her husband and his family in Pakistan were violent towards her. She made the complaint that she had no confidence in the police as her husband had been a policeman in Pakistan as had his father before him. The husband, to the first named applicant's knowledge is working in a take-away in the United Kingdom. The applicant gave a history of fear of returning to Pakistan because her sons would be in an army school which might be vulnerable to attack. The applicant further indicated that she did not wish to return to her husband as her husband prior to her fleeing from the United Kingdom had threatened to advise the authorities so as to ensure that she would be returned to Pakistan. The applicant also fears her daughter would be subject to domestic violence if returned to Pakistan. During the currency of the process which commenced with the asylum application of 5th June 2015 the first named applicant produced a medial report which confirmed that she suffered from PTSD and depression.

7. During the course of the examination of the applicant's file under Dublin III the applicants requested that the discretion provided by Article 17 of Dublin III be exercised so as to enable their application to be maintained within Ireland rather than returning to the United Kingdom and the first named applicant also gave evidence that she was fearful of her husband finding her if returned to the United Kingdom which would not be in the children's best interest as the children had witnessed domestic violence by the husband and indeed her eldest son was also physically abused by her husband.

8. It was noted during the hearing before the Tribunal on 7th November 2016 that the first named applicant's medical status had much improved.

Article 17 of Dublin III

A. Who is entitled to exercise the Discretion?

9. The parties agree that the first query to be addressed under this heading is identifying the body designated to exercise the discretion pursuant to Article 17 of Dublin III. Dublin III is a Regulation establishing the criteria and mechanism for determining the

Member State responsible for examining an application for international protection in all of the Member States and Recital No. 17 thereof provides that any Member State should be able to derogate from the responsibility criteria in particular on humanitarian and compassionate grounds even if such examination is not its responsibility under the binding criteria laid down in the Regulation.

10. Article 3 of Dublin III provides that the application for international protection shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter 3 indicate is responsible. It is clear therefore that the Chapter 3 criteria are the relevant binding criteria laid down by the Regulation referred to in Recital No. 17 aforesaid.

11. Article 17.1 provides:-

> "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."

Applicant's Arguments
12.:-

> 1. The applicants argue that it is ORAC, and on appeal, RAT, and now their successors in title, who are vested with the authority to exercise the discretion as opposed to the argument presented on behalf of the respondent, to the effect, that it is the Minister for Justice on behalf of the State who is vested with such authority.
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> 2. The applicants refer to Regulation 3(1) (a) of Statutory Instrument No. 525 of 2014, to support this proposition. This Regulation is, to the effect, that the functions of a determining Member State will be performed by the Commissioner.
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> 3. The applicants further argue that it was intended that the 2014 Regulation would be fully comprehensive and, therefore, argue that all matters pertaining to Dublin III are included within the Regulation and, therefore, the functions of a determining Member State must incorporate the exercise or otherwise of the discretion provided for in Article 17 of Dublin III.
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> 4. The applicants also refer to:-
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> > (a) Case C-411/10 *N.S. v. Secretary of State for the Home State*, judgment of the Court (Grand Chamber) 21st December 2011 at Para. 98 which provides that where the procedure for determining the Member State responsible takes an unreasonable length of time the Member State must examine the application under the discretionary clause (Dublin II);
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> > (b) The repeat of the above comments is included at Para. 35 of Case C-4/11 *Bundeserepublik Deutschland v. Kaveh Puid*, Judgment of the Court (Grand Chamber), 14th November 2013;
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> > (c) The text book of Kay Hailbronner and Daniel Thym, *EU Immigration and Asylum Law: A Commentary* (2nd Edition, 2016) at pages 1533-1534 which suggests Art. 17 may become mandatory in some circumstances;
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> > (d) The *RSM v. Secretary of State for the Home Department* [2017] UKUT 124 (IAC) decision, in particular **at Para. 43** which suggests that Art.17 has a role to play in expediting a matter;

- in support of their argument that ORAC, etc, is vested with the Art.17 discretion.

13. In addition, the applicants argue:-

> (i) ORAC is vested with the functions of a Member State under Article 6 of Dublin III by virtue of Regulation 3 (3) of the 2014 Regulations which, in turn, provides that the best interest of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation and, therefore, in order to fulfil this function, it is necessary that ORAC would have the discretion provided for in Article 17;
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> (ii) The word "functions" contained in Regulation 3(1) (a) of the 2014 Regulations includes obligations and discretions;
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> (iii) In the matter of *N.S.* the European Court of Justice confirmed that the discretionary power was part of the mechanism for determining responsibility of Member States. The applicants refer to Case C-578/16 CK and *Others v. Republika Slovenija*, judgment of the Court (Fifth Chamber) of the 16th February 2017 at Para. 53 it was noted that the discretionary article is an integral part of the system for determining Member States responsible.
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> (iv) The applicant argues that if Article 17 discretion is not within the scope of determining the Member State responsible then Article 27, providing for an effective remedy, appears outstanding.
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> (v) In addition to the argument that Statutory Instrument No. 525 of 2014 was intended to be comprehensive the applicant also makes the argument that by virtue of Regulation 3 (1) (a) the discretionary power in Article 17 was in fact vested in ORAC. This provision states that "the functions of a determining Member States" shall be performed by the Commissioner.
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> (vi) That reference "in particular" in Recital No. 17 of Dublin III implies that the discretion may be used other than in compassionate or humanitarian circumstances and therefore the discretion can arise in a wide variety of circumstances.

Respondents Arguments
14. The respondent counters that *N.S.* was concerned with the query as to whether or not the discretionary power involved EU law, or domestic law only, as was contended for by certain States including Ireland and the decision of the court was to the effect that the discretion engaged EU law. Further insofar as the *CK* decision is concerned the respondent argues that the court was in fact concerned with the application of Article 3.1 and points to the opinion of the Advocate General in that matter who opines that Article

17 (1) of the Dublin III cannot serve as a basis for an obligation to examine an application for international protection in the case where it is impossible to transfer the applicant to the Member State responsible.

15. In further resisting the argument that the discretion is vested in ORAC the respondent suggests:

1. 'Functions' is neither defined in Statutory Instrument No. 525 of 2014 or in Dublin III and further argues that the discretion afforded by Article 17 is a sovereign prerogative afforded to each Member State.

2. ORAC's involvement concludes with making a decision to transfer, and subsequently the RAT's involvement concludes with making its decision on appeal however Article 17 can in fact be exercised up to the point of transfer and therefore it is not consistent with the possibility of exercising discretion in Article 17 up to the point of transfer to have same invested in ORAC and/or RAT.

3. The Statutory Instrument No. 525 of 2014 does not accord with the applicant's argument that it is intended to be comprehensive. It is clear from the introduction to Regulation 2014 that same is the for the purpose of giving further effect to Dublin III.

4. (i) The vesting of Article 6 obligations in ORAC does not by definition incorporate Article 17 discretion as the interest of the child can be protected by arrangements between Member States or by affecting a delay in the transfer.

(ii) Further in this regard the respondent argues that ORAC's jurisdiction provided for by Statutory Instrument No. 525 of 2014 relates to the best interest of the child in respect of the procedures provided for in Dublin III whereas in fact no procedures are provided for in respect of Article 17 within Dublin III.

(iii) On the basis of the foregoing the respondent argues that the applicant's submission that because ORAC has jurisdiction in respect of Article 6 as provided for in Regulation 3 (3) of the 2014 Statutory Instrument and therefore Article 17 is involved, is not well-founded.

5. Statutory instrument No. 525 of 2014 does not mention in any portion thereof the Article 17 discretion.

6. The relevant applicant has a right to certain information as provided for in Article 4 of Dublin III. The relevant notice providing such information has been devised centrally by the EU and in this regard there is no information whatsoever concerning the Article 17 discretion therein save the possibility of the non application of the Chapter III of Dublin III.

7. The respondent distinguishes Article 17 for the mandatory provisions provided for by Dublin III by indicating that time limits are provided for within Dublin III in respect of mandatory issues but no time limit whatsoever is provided for in respect of Article 17 discretion.

8. (i) Even if it could be successfully argued that Regulation 525 of 2014 could be read as vesting the executive prerogative in the Commissioner, in fact, this interpretation is not constitutionally possible and, therefore, such an interpretation should not apply. The respondents rely on the Supreme Court judgment in *Laurentiu v Minister for Justice* [1999] 4 I.R. 26, and *Maher v. Minister for Agriculture* [2001] 2 I.R. 139.

(ii) In the judgment of *Laurentiu*, it was held that there were limits on permissible delegation by organs created by the Constitution and the Oireachtas cannot abdicate its power to legislate.

(iii) The decision in *Maher* aforesaid is relied upon to the effect that that case, as the instant case, centred essentially on the exercise by the State by means of secondary legislation of a number of options or discretions conferred by the community rules. It was held that in circumstances where choices are left to the Member States which may be of such significance in their nature or scope or so unconnected with community policies and aims, they require specific legislation then resort to Regulations in such cases would infringe Article 15.2.1 of the Constitution.

(iv) Article 15.2.1 of the Constitution provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas.

(v) Denham J. in the matter of *Meagher v. Minister for Agriculture* 1994 1 IR 329 at page 365 stated that if the Directive left to the national authority matters of principle or policy to be determined then the "choice" of the Minister would require legislation by the Oireachtas. But where there is no case made that principles or policies have to be determined by the national authority, same being determined in the Directive then legislation by regulation is a valid choice.

(vi) Fennelly J. in his judgment agreed that the essential question is whether the first named respondent was in breach of Article 15.2.1 of the Constitution and if he was, the Regulations would be invalid as they did not involve Community necessitated rules.

(vii) The respondent argues that Article 17 is a sovereign discretionary facility not encompassed within Chapter 3 of the mandatory criteria for determining which Member State is responsible, and given that there are no procedures or conditions attached to Article 17 discretion then to interpret the Statutory Instrument No. 525/2014 as effecting the transfer of this discretion to ORAC under Regulation 3 (1) (a) of Regulation 525 of 2014, would be unconstitutional.

9. Paras. 88 and 97 of *CK* states that Art. 17 cannot in circumstances as arose in that matter be interpreted as requiring a Member State to apply the discretion.

10. Para. 59 of the opinion of the Advocate General in *Puid*, states there is no clear and unconditional obligation imposed

by the discretion clause.

11. Para. 57 of Case C-394/12, *Abdullahi v. Bundsesasylamt*, Judgment of the Court (Grand Chamber), 10 December 2013 states that the optional provision grants wide discretionary powers to Member States.

12. Para. 36 and 37 Case C-528/11, Halaf, Judgment of the Court (Fourth Chamber) of 30 May 2013 states that the exercise of the option is not subject to any particular condition and allows Member States to decide sovereignty.

13. The wording of Regulation 5 of S.I. 525/2014 and Article 26 (1) of Dublin III mirror each other and are to the effect that both recognise a transfer decision and a distinct derogation decision.

16. With regard to the applicants argument concerning Article 27 the respondent disagrees and refers to the UK Court of Appeal matter of *Secretary of State for the Home Department v. Z.A.T.* [2016] EWCA Civ. 810, together with the matter of *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 and *Mallak v Minister for Justice* [2012] IESC 59, to the effect that judicial review will lie, under the ordinary public, natural and/or constitutional law principles.

Judgment
17. By reason of the foregoing it is clear that no policy as to the exercise of the discretion was incorporated in Dublin III.

18. In the matter of *ZAT* the United Kingdom Court of Appeal found that the refusal to exercise Article 17 discretion is justicable and at para. 80 of that judgment reference is made to a prior judgment dealing with Dublin II, which had no provisions such as that now contained in Article 27 (1) of Dublin III, nevertheless an individual had a right under the ECHR to challenge a removal decision. This in my view is consistent with domestic jurisprudence such as *Meadows and Mallak* where each confirmed that even with the exercise of a discretionary power the Minister and all decision makers must act fairly and rationally and within the confines of natural and constitutional justice. The process must be fair open and transparent (see para. 68 of *Mallak*).

19. The applicants refer to the opinion of the Advocate General in the matter of *Puid* where at para. 59 the Advocate General refers to the fact that further measures are required in respect of the discretion provided in Dublin II as there are no clear and unconditional obligations imposed.

20. It is interesting to note that no such measures as suggested are adopted in this regard in the content of Dublin III so that the Article 17 discretion in Dublin III is such that there is no clear and unconditional obligation imposed on the Member States in this regard.

21. The applicant also refers to the United Kingdom upper Tribunal decision in RSM wherein at para. 42 it is provided that Article 17 is an integral part of the machinery established by Dublin III.

22. This integral part of the system is again confirmed in para. 53 of the EU decision in *C.K.* Although the discretion is an integral part of the system or machinery nevertheless the limits in respect thereof are noted as was referred to in the judgment and by the Advocate General's opinion in the matter to the effect that an obligation to examine the matter under Article 17 does not arise even where it is not possible to transfer an applicant to the Member State responsible because of the implications of Article 3 and this opinion is consistent with the opinion of the Advocate General in the matter of *Puid* aforesaid where it is noted that there were no clear and unconditional obligations imposed in respect of the exercise of the discretion.

23. In my view the discretionary power available to Member States provided for by Article 17 remains part of the machinery provided, however, this fact, of itself does not overcome the fact that Art.17 confers a wide discretionary sovereign power unfettered by conditions or policies.

24. The interpretation advocated by the applicants, that Reg. 3 (1) (a) of S.I. 525/2014 vests Article 17 discretion in ORAC, in my view cannot withstand the test mentioned by Denham J. in *Meagher*, aforesaid.

25.:-

(1) I do not accept the Respondents argument that Article 26 of Dublin III and in turn, Reg. 5 of S.I. 525/2014 recognises two separate decisions being one of transfer and one of derogation. Rather, as contended for by the applicants, because of reference to the subsections in Art. 18 of Dublin III, in Art. 26 the second potential decision in Article 26 refers to matters concerning completed, withdrawn or multiple applications as opposed to a derogation decision.

(2) However, and independently of the constitutional element to the interpretation of Statutory Instrument No. 525/2014, the following matters militate against a finding that ORAC was afforded the Art. 17 discretion by virtue of the regulation:-

i. There is no mention at all of Art.17 in the regulation therefore any argument that ORAC is vested with the discretion would have to be by implication only.

ii. There are no policies incorporated in the Regulation as to Art.17 discretion and hence if ORAC is vested with same ORAC is at large as to its application.

iii. It is clear from the UK Court of Appeal matter of *ZAT* (Para. 85) that in the UK the Secretary of State is the party vested with the discretion and the UKUT has no supervisory role (see Para 43 of *RSM*). This is a status inconsistent with the applicant's argument that a bifurcated system is too cumbersome. The Court of Appeal in the UK has not identified its system as breaching an effective remedy requirement.

iv. Although it is difficult to reconcile the views expressed by the ECJ in *N.S.* and *Puid*, and the UKUT decision in *RSM* (see Para. 14 hereof) with the views expressed by the ECJ in *C.K.* (Para. 17.9 hereof), in particular having regard to the dangers posed to and by the applicant in C.K., it does appear from the totality of those decisions that circumstances in which the Article 17 discretion might become mandatory would be rare and this distinguishes Article 17 from any other mandatory provision of Dublin III.

v. Accordingly the argument of the applicants that the discretion may become mandatory and therefore should be vested in ORAC is undermined.

vi. The applicants argue that the words "in particular" in Recital 17 admits of a user of the Art. 17 discretion outside the concept of compassionate or humanitarian is accepted; however this in my view demonstrates the current lack of policy as to the exercise of the discretion thereby reducing the possibility that the Statutory Instrument No. 525/2014 afforded ORAC the discretion.

vii. There is no mention in the body of the regulation that it is intended to be comprehensive and there is no valid argument to this effect.

viii. ORAC's jurisdiction under the regulation appears to end on making the transfer decision and giving notice of same (see Regulation 5) and this is not consistent with a possible exercise of the discretion without any time constraint.

ix. I accept and agree with the respondents' arguments at Para. 17.4 hereof to the effect that the vesting of the obligation as to the best interest of the child does not imply vesting of Article 17 discretion.

26. In the circumstances having regard to both Statutory Instrument No. 525 of 2014 and the content of Dublin III together with the jurisprudence of the European Court of Justice as herein before referred to it is the view of this Court that the discretionary power provided by Article 17, available to all Member States, has not been vested in ORAC, and in turn, IPAT, by virtue of Regulation 3 (1) (a) of Statutory Instrument 525/2014. Further, no argument has been made suggesting ORAC was vested with the discretion under the provisions of Dublin III, and in any event it is clear from the foregoing jurisprudence of the ECJ and opinion of Advocates General that under Dublin III the discretion is a sovereign discretion given to each Member State.

B. Adequate system

27. It is common case that currently there is no legal or administrative provision or any system dealing specifically with the application of Article 17 discretion whether within Dublin III or Statutory Instrument No. 525 of 2014 and consequently neither requires or indeed envisages such a system being set up.

28. The applicant relies on the opinion of the Advocate General in *Puid*, where he states at para. 59, dealing with Dublin II, that further measures are clearly required when a Member State is vested with discretion as there is no clear and unconditional obligation imposed on Member States. Notwithstanding this view nevertheless Dublin III clearly did not impose any clear and unconditional obligation. In these circumstances it appears to be the view of the Advocate General aforesaid that asylum seekers cannot derive any right from the discretionary provision whereby they could require a Member State other than the one responsible, to examine their application for asylum.

29. The applicant also relies on the fact that the principles and values of legal certainty the rule of law and good administration clearly require procedures to be set and in this regard further refers to Article 41 of the *CFEU* which also relates to the right to good administration.

30. I am not persuaded by the applicant's argument aforesaid by reason of :-

a. There is no system within the text of Dublin III or the 2014 domestic Regulations requiring such a system.

b. The application for judicial review is not premised on any argument that the 2014 Regulations are invalid as they are non compliant with an obligation to put a system in place.

c. The opinion of the Advocate General in *Puid* aforesaid, confirms that there is no clear and unconditional obligation imposed on Member States vis-à-vis the discretionary power and at para. 73 the Advocate General opines that there is nothing in Dublin II to vest in an applicant a subjective right to compel an identified Member State to exercise the discretion.

d. In *Halaf* the judgment of the Court was to the effect that it is apparent from the wording of Article 3 (2) of Dublin II that the exercise of the option is not subject to any particular condition and the rule provided for in Article 3 (2) of Dublin II allows Member States to decide to agree to examine an application for international protection even if it is not its responsibility under the Regulations. These views apply equally to Dublin III.

e. No procedural deficit has been identified in the recent judgment of the European Court in *C.K.*

f. The text book relied upon by the applicant to make the argument on the point of legal certainty at page 244 suggests that legal certainty is invoked more commonly as a rule of interpretation than as a ground for review.

g. In *Luximon v. Minister for Justice and Equality* [2016] IECA 382 at Para. 62 the Court of Appeal rejected the argument that the Minister for Justice was in breach of fair procedure or natural and constitutional justice in not publishing a policy or criteria in deciding certain discretionary powers.

Conclusion

33. The sovereign discretion referred to in Article 17 of Dublin III has not been vested in ORAC and remains with the Minister for Justice/the Oireachtas.

34. There is no requirement of or wrongful failure by the Minister for Justice in failing to publish a policy or criteria in respect of the exercise of the Article 17 discretion.