[2019] IEHC 623

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 662 JR]

BETWEEN

W.G.

APPLICANT

AND

THE CHIEF SUPERINTENDENT OF THE GARDA NATIONAL IMMIGRATION BUREAU

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

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

Introduction

1. This is the judicial review of the proposed transfer of the applicant, a national of Pakistan, to the United Kingdom as the European Union Member State responsible for examining his application for international protection, pursuant to the decision of the Refugee Appeals Tribunal ('the tribunal') of 18 April 2016 to affirm the transfer decision of the Refugee Applications Commissioner ('the Commissioner') of 21 January 2016.

2. The proposed transfer is to occur pursuant to the European Union (Dublin System) Regulations 2014 ('the 2014 Regulations'), which were made in exercise of the power conferred on the Minister for Justice and Equality ('the Minister') by s. 3 of the European Communities Act 1972 to give further effect to *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').

Background

3. Having entered the State illegally, the applicant applied for asylum at the Refugee Application Centre in Dublin on 9 June 2015. He was interviewed by an immigration officer in accordance with the requirements of s. 8 of the Refugee Act 1996, as amended ('the Refugee Act'), and completed an asylum application form ('ASY-1') on that date. The applicant stated that he had made the journey from Pakistan to Ireland, travelling by truck and ferry through unknown countries for approximately one month after his departure from Pakistan on 9 May 2015 until his arrival in Ireland on 9 June 2015. He acknowledged that he had previously entered the United Kingdom in 2011 on a student visa but claimed to have returned to Pakistan in 2013.

4. The applicant completed the necessary questionnaire for the Office of the Refugee Applications Commissioner ('ORAC') on 17 June 2015. In it, having set out the basis for his refugee status claim, he again acknowledged that he had travelled to the U.K. on a student

visa in 2011, returning to Pakistan in December 2013. He went on to assert that he had since lost his passport and had forgotten where he had lived while resident in the U.K.

5. ORAC then made a request for information to the United Kingdom, pursuant to Art. 34 of the Dublin III Regulation, on 13 July 2015. The UK Visas and Immigration division of the Home Office replied on 10 October 2015, confirming that the applicant had been issued with a 'Tier 4 (General) Student visa', valid from 19 July 2011 to 7 April 2013, and that, on 11 June 2013, the applicant had been granted leave to remain as a Tier 4 migrant until 18 December 2014. There was no record of the applicant applying for international protection or asylum while in the UK.

6. The applicant was formally interviewed, pursuant to Article 5 of the Dublin III Regulation, on 28 October 2015 and repeated the same account.

7. A request was made to the United Kingdom to accept responsibility, pursuant to Art. 12(4) of the Dublin III Regulation, for the examination of the applicant's international protection application on the basis that the applicant was in possession of a residence document (leave to remain in the UK until 18 December 2014) that had expired less than two years previously when he applied for asylum in Ireland on 9 June 2015. The United Kingdom acceded to that 'take charge' request on 30 November 2015.

8. The Commissioner decided to transfer the application for international protection on 21 January 2016. ORAC wrote to notify the applicant of that decision on the same date.

9. The applicant submitted an appeal against that decision, under cover of a letter from his solicitors dated 5 February 2016, on the ground that the Commissioner had erred in fact in not accepting that he had returned to Pakistan from the United Kingdom before travelling to Ireland. No evidence was produced in support of that contention.

10. In a decision dated 18 April 2016, the Refugee Appeals Tribunal affirmed the transfer decision.

11. On 28 April 2016, an immigration officer sent a notice in writing, pursuant to Reg. 8(2) of the 2014 Regulations, to both the applicant and the applicant's then solicitor, requiring the applicant to present himself at a designated time and place on 5 May 2016 for transfer to the United Kingdom.

12. The applicant avers that he changed address in early April 2016, although he acknowledges that he did so without informing the Commissioner of that event as soon as possible, contrary to the express requirement of s. 9(4A)(a) of the Refugee Act. A breach of that requirement is a criminal offence under s. 9(7) of that Act.

13. The applicant avers that he told his former solicitor of his change of address and that the solicitor agreed to inform the Commissioner of it on his behalf, although he or she obviously did not do so. Such allegations concerning the failures and shortcomings of previous legal

representatives are as common in this list as snuff at a wake. There is nothing to suggest that the applicant's current legal representatives provided his previous legal representatives with any opportunity to respond to, or rebut, the relevant allegation of professional negligence in this case, before ventilating it on the applicant's behalf. I have deprecated that approach before in *Bebenek v Minister for Justice and Equality* [2018] IEHC 323, (Unreported, High Court, 30 May 2018) (at para. 124) and I do so again now. In those circumstances, I cannot attribute any weight to that averment.

14. The applicant failed to present for transfer on 5 May 2016 and was deemed to have absconded.

15. On 1 June 2016, the INIS wrote to inform the UK Home Office that, having failed to present for transfer, the applicant had been deemed an absconder. In that letter, the INIS formally invoked the 18-month extension of the time limit for transfer provided in those circumstances under Art. 29(2) of the Dublin III Regulation.

16. The applicant was arrested at his home on 5 August 2017 by a member of An Garda Síochána and detained in Cloverhill Prison, pursuant to Reg. 8(4) of the 2014 Regulations, for the purpose of facilitating his transfer to the United Kingdom.

Procedural history and original grounds of challenge

17. The application was originally based on a statement of grounds, dated 11 August 2017, supported by an affidavit the applicant's solicitor, sworn on the same day.

18. By order made on that date, Meenan J granted the applicant leave to seek the following substantive reliefs:

    (a) an order of *mandamus* (*sic*) restraining the transfer of the applicant to the UK under the decision made by the tribunal on 18 April 2016, and pursuant to the 2014 Regulations and the Dublin III Regulation;

    (b) a declaration that the transfer of the applicant would be in breach of Art. 29(1) of the Dublin III Regulation; and

    (c) A declaration that the transfer of the applicant would be in breach of Reg. 25(7) of the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'), transposing Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States ('the Citizens' Rights Directive').

19. In his grounding affidavit, the applicant's solicitor averred that he obtained authority to act when he visited the applicant in Cloverhill Prison on 9 August 2017, before going onto aver that, after the tribunal's decision of 18 April 2016, 'no steps were taken by [the Minister] to transfer the applicant until he was arrested on 5 August 2017'. Thus, the applicant's solicitor

averred, there had been a failure to comply with the obligation under Art. 29(1) of the Dublin III Regulation to transfer the applicant 'as soon as practicably possible, and at the latest within six months of acceptance of the request by another Member State to take charge or take back the person concerned or of the final decision on an appeal or review.'

20. Those averments give rise to significant concern. As we shall see, the applicant's solicitor had been acting for the applicant concerning his immigration status in the State since March 2017 and, thus, would have had ample time to take comprehensive instructions from him and to make any necessary inquiries on his behalf. Had the applicant's solicitor done so, it would have become quickly apparent that it was the applicant who was in default – indeed, in breach of s. 9(4A)(a) of the Refugee Act in respect of his transfer to the United Kingdom – and not the Minister.

21. The applicant's solicitor went on to aver, essentially, as follows.

22. The applicant was in a committed relationship with an EU citizen residing in the State, whom he had married in a religious ceremony on 15 March 2016. The applicant's solicitor had submitted an application under the 2015 Regulations for a residence card on the applicant's behalf, as the partner with whom that EU citizen had a durable relationship (and, hence, as a permitted family member of the EU citizen concerned), on an unspecified date (later established to be 13 March 2017).

23. The applicant's solicitor did not exhibit a copy of that residence card application but did exhibit copies of various documents submitted in support of it. Bewilderingly, those documents include a sequence of domestic gas bills in the joint names of the applicant and the EU citizen concerned for an address in County Dublin that commence with a bill issued on 29 April 2015, shortly before – on the applicant's account – he fled persecution in Pakistan, and over a month before he attended at the Refugee Applications Centre on the day of his arrival in Ireland.

24. The residence card application was refused on 18 July 2017. The applicant's solicitor did not exhibit a copy of the refusal decision.

25. The applicant's solicitor did exhibit a copy of the completed review request form, dated 26 July 2017, that he submitted to the EU Treaty Rights Review Unit of INIS on the applicant's behalf under cover of a letter, dated 8 August 2017. That was, of course, after the arrest of the applicant on foot of the transfer decision.

26. The applicant's solicitor wrote by email to the Garda National Immigration Bureau ('GNIB') on 10 August 2017, asserting that the applicant had a right to remain in the State pending the determination of that review, pursuant to the terms of Reg. 25(7) of the 2015 Regulations, which provides that, where a person has applied for the review of a removal order and for the suspension of the enforcement of the order, the removal of that person will be suspended until the determination of the review, unless that removal is based on

imperative grounds of public security. I pause to note that the applicant was never the subject of a removal order as that term is defined under Reg. 20 of the 2015 Regulations.

27. Having received only an automated holding reply to that email, the applicant's solicitor applied to this Court on 11 August 2017 for leave to seek judicial review of the proposed transfer of the applicant, as already described.

28. As part of that application, the applicant sought, and was granted, an interim *ex parte* injunction restraining his transfer to the United Kingdom. Thus, the Court was being presented with a 'last minute' injunction application to prevent the transfer of a person in detention in which the recent receipt of instructions by the solicitor concerned was used to justify and explain the very scant evidence and argument upon which the Court was being invited to make orders urgently on an *ex parte* basis; see *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin); *Bebenek v Minister for Justice and Equality* [2018] IEHC 322, (Unreported, High Court (Keane J), 30 May 2018).

29. Although I have not seen the relevant Order of the Court, it appears to be common case that, on the return date of the applicant's motion for the reliefs now sought, an interlocutory injunction in the same terms was granted on consent between the parties, pending the determination of these proceedings.

30. On 10 November 2017, the applicant swore his first affidavit in these proceedings. In it he averred that his current solicitor had obtained his file from his former solicitor on 20 October 2017 and that only then had his failure to notify the Commissioner of his change of address in breach of s. 9(4A) of the Refugee Act become apparent to him and to his current legal representatives.

31. On that basis, the applicant issued a motion on 13 November 2017, seeking leave to amend his statement of grounds to permit him to seek an additional declaration that his transfer to the United Kingdom would be in breach of Art. 29(2) of the Dublin III Regulation, whereby the time limit of six months under Art. 29(1) can be extended up to a maximum of eighteen months if the person concerned absconds, on the additional ground that it was then over 18 months since the date of acceptance of the request and the final transfer request.

32. Although – once again – I have not been shown the relevant Order, I understand that the Court permitted the amendments sought on 11 December 2017 and an amended statement of grounds was filed on 12 December 2017.

33. The respondents filed a statement of opposition on 2 January 2018. In it, they raise what seem to me to be four broad grounds of arguments in opposition to the application.

34. The first is that the relevant time limits under Art. 29 are only enforceable as between Member States and are not justiciable at the instance of an applicant for international protection to challenge a decision to transfer him. At the hearing of the application, the respondents conceded that the point has been conclusively settled against that contention

by the decision of the European Court of Justice ('ECJ') in Case C-201/16 *Shiri v Bundesamt für Fremdenwesen und Asyl* ECLI:EU:C:2017:805.

35. The respondents' second argument is that the applicant is not entitled to a benefit in these proceedings because of his manifest and egregious bad conduct in the State: first, by becoming an absconder in the context of the decision to transfer him to the United Kingdom under the Dublin III Regulation and the 2014 Regulations; and second, by unlawfully pursuing permission to reside in the State on the basis of a marriage of convenience.

36. The respondents' third argument is that there has been no breach of the time-limit under Art. 29 of the Dublin III Regulation in the circumstances of this case.

37. And the fourth argument advanced by the respondents is that Reg. 25(7) of the 2015 Regulations did not operate to suspend the removal of the applicant from the State or his transfer to the UK under the 2014 Regulations or the Dublin III Regulation.

38. The respondents' statement of opposition is supported principally by an affidavit sworn on 14 December 2017 by John Moore, a higher executive officer in the INIS within the Department of Justice and Equality.

39. Mr Moore exhibited a copy of the application form, dated 13 March 2017, that the applicant submitted in support of his claim for permission to reside in the State as the partner in a durable relationship, duly attested, with an EU citizen exercising free movement rights in Ireland, pursuant to Reg. 5(2) of the 2015 Regulations, transposing Art. 10 of the Citizens' Rights Directive.

40. It is important to note in the applicant's favour that, on that form, the box marked 'yes' was ticked beside the question whether he was 'currently subject to a Transfer Order made in Ireland'.

41. However, I am unpersuaded by the submission that, by including his address on that application form submitted in the ordinary way to the EU Treaty Rights Division of the INIS, he was addressing his status as a person who had absconded for the purpose of Art. 29(2) of the Dublin III Regulation.

42. Nor am I persuaded by the suggestion that the provision by the applicant of a notification of change of address to ORAC for the purpose of the Refugee Act on 22 December 2016, which was not properly proved in evidence but which I have no reason to doubt the existence of, was sufficient to bring that status to an end.

43. In my view, in order to cease being an absconder it was incumbent upon the applicant – at the very least – to address the consequences of his earlier failure to comply with his legal obligations under the Act of 1996, which failure had frustrated the service upon him of the directions notice in respect of his transfer, issued pursuant to Reg. 8(2) of the 2014 Regulations by an immigration officer within the Dublin System Transfer Unit of the INIS, by

making the necessary inquiries and directly establishing contact with that Unit. It is impossible to be impressed by the applicant's implied criticism of the lack of communication within different divisions or units of the INIS or between the tribunal and the INIS when no such communication would have been necessary had the applicant complied with his own statutory obligations in the first place, or had he subsequently taken the appropriate steps to rectify his failure to do so.

44. Mr Moore also exhibited a copy of the recommendation of the official in the EU Treaty Rights Unit of the INIS that led to the refusal of permission for the applicant to reside in the State as a permitted family member of an EU citizen. That recommendation includes the following narrative:

> 'Applicant applied for EU treaty rights [as a person in a durable relationship, duly attested, with an EU citizen] on the 19/4/2017. The EU citizen does not state when she entered the State. They have submitted an Islamic marriage certificate dated 15/02/2016. They applied to [the] Registrar's Office in Drogheda on the 21/9/2015 for [a] wedding date of 27/11/2015. They have submitted evidence of an application form dated 27/10/2015 for [a] marriage to take place at Navan Registry Office and another application form for marriage to take place on the 01/12/2015 at 163 SCR Dublin 8 Islamic Centre of Ireland. Couple state that they met in the summer of 2015 and after a few weeks decided to plan to get married.
>
> They were interviewed on the 15/3/2016 and an objection to the proposed marriage has been lodged in accordance with s. 58(4A) of the Civil Registrations Act 2004 [as amended]. The grounds of the objection are that the proposed marriage would constitute a marriage of convenience. Under the terms of the Act, the objection was forwarded to the Superintendent Registrar for decision. Following investigation of the objection to the proposed marriage under s. 58(4) of the Civil Registration Act 2004 there was sufficient evidence to uphold the objection and (*sic*) that an impediment to the marriage exists. The solemnisation of the marriage will not therefore proceed.'

45. Mr Moore exhibits a letter, dated 5 September 2016, from the Superintendent Registrar of the Registrar's Office in Drogheda County Louth, to the Director General of the INIS. It is headed 'Proposed marriage of [the applicant] and [the EU citizen]' and states, in material part:

> 'Following investigation of the objection to the proposed marriage under s. 58(4A) of the Civil Registrations Act 2004 it is my decision that there is sufficient evidence to uphold the objection and that an impediment to the marriage exists. The solemnisation of the proposed marriage will not therefore proceed.
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> The grounds for this impediment are that, based on the evidence available, it is considered that the proposed marriage would constitute a marriage of convenience.'

46. None of this information was disclosed to the Court when, through his legal representatives, the applicant sought and obtained an interim *ex parte* injunction restraining his transfer to the United Kingdom on the ground, among others, that it would breach his rights as a person in a durable relationship, duly attested, with an EU citizen residing in the State.

47. Mr Moore exhibits a letter, dated 18 July 2017, from INIS to the applicant, informing him that his application to be treated as a permitted family member of the EU citizen concerned had been refused, before setting out the reasons summarised above. The letter went on to inform the applicant of his entitlement to request a review of the decision but warned that, if he did not submit such a request, a notification of the Minister's proposal to make a deportation order against him would issue. There was no suggestion in that letter that a removal order would be made against him, nor is it possible to see how that might have occurred as a matter of law. The applicant's solicitor did not disclose the contents of that correspondence to the Court when seeking an interim *ex parte* injunction on the ground, amongst others, that the applicant could not be removed from the State having sought a review of the decision that he was not entitled to be treated as a permitted family member of the EU citizen concerned.

48. James Doyle, a detective sergeant in An Garda Síochána attached to the GNIB, swore a short affidavit on behalf of the respondents on 12 December 2017. In it, he avers to the circumstances of the arrest and detention of the applicant on 5 August 2017 and to the intention of the GNIB to proceed with the transfer of the applicant to the United Kingdom in accordance with the transfer decision of the Commissioner, affirmed by the tribunal, should the existing injunction expire or be discharged.

49. The applicant swore a short affidavit on 2 February 2017 in reply to that of Mr Moore. In it, he acknowledges that an impediment had been found to his proposed marriage in the form of the Superintendent Registrar's opinion that it was to be a marriage of convenience. The applicant averred that he and the EU citizen had wished to appeal that decision but did not realise that there was an applicable 28-day time-limit to do so and were advised at the time that the cost of lodging such an appeal would be prohibitive. Even if I were to accept those uncorroborated averments, upon which I express no view, the result would still remain that the Superintendent Registrar's accomplished and uncontroverted finding of the 5 September 2016 is that the proposed marriage of the applicant and the EU citizen would not be a valid marriage under the law of the State as it was to be a marriage of convenience. A marriage of convenience is defined under s. 2 of the Civil Registration Act 2004, as amended, to mean a marriage where at least one of the parties to the marriage — (a) at the time of entry into the marriage is a foreign national, and (b) enters into the marriage solely for the purpose of securing an immigration advantage for at least one of the parties to the marriage. None of this was drawn to the attention of the Court in seeking interim *ex parte* relief.

Analysis

50. The applicant's principle argument is that his transfer to the United Kingdom is now precluded by the terms of Art. 29(2) of the Dublin III Regulation because the time limit

applicable in cases where a person absconds of eighteen months from the acceptance by the responsible Member State of the take charge request (in this case, that of the UK on the 30 November 2015), has been exceeded, in that only the tribunal's review of the transfer decision that concluded with its decision on 18 April 2016, and not the present judicial review proceedings, in which an injunction was granted on 11 August 2017 that continues in effect, had, as a matter of European Union law, the suspensive effect that Member States are permitted to provide for under Art. 27(3) of the Regulation, with the consequence that responsibility for examining the applicant's international protection claim has been automatically and conclusively transferred to Ireland.

51. To use a neutral expression, that is an audacious argument. If it were correct, it would mean that it was the injunction against his transfer that the applicant obtained from this Court on 11 August 2017 on grounds now shown to be meritless in law and in fact that has had the effect, by remaining in force beyond the date in October 2017 when the period of eighteen months from the decision of the tribunal affirming that transfer expired, of preventing his transfer to the United Kingdom, thus allowing him to amend his original statement of grounds in November 2017 to advance that new and artificially created ground of challenge to that transfer. There was no suggestion that the Court was alerted to the applicant's intention to rely on such an argument when that injunction was sought in August 2011 or at any time after that date until a motion issued on 13 November 2017 at which point, on the applicant's view of the law, the continuation of that injunction had provided him with a *fait accompli* in the underlying proceedings. The words of Mr Bumble in Charles Dickens' Oliver Twist seem to reverberate: 'If the law supposes that, the law is an ass – an idiot'.

52. It is at once obvious that, in addressing the applicant's argument, two separate questions necessarily arise. The first is whether the law does suppose that. The second is whether these proceedings should be dismissed as an abuse of the process of the court.

53. The applicant's argument relies on a literal reading of Art. 27(3), which states:

> 'For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:
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> (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
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> (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.

54. The applicant further relies on an agreed note of the *ex tempore* decision of the Court of Appeal in *T.A.J. v Refugee Appeals Tribunal* (Unreported, Court of Appeal (Ryan P, Peart and Hogan JJ, 8 December 2016). Ryan P identified the question before the Court of Appeal in that case as whether the combined effect of Arts. 27 and 29 of the Dublin III Regulations suspended the transfer of the appellant in that case to the responsible Member State while his judicial review proceedings challenging that transfer decision were still continuing. The appellant contended that those proceedings had a suspensive effect under Art. 27. The Court of Appeal concluded that they did not. In reaching that conclusion, the Court of Appeal (*per* Ryan P) added the caveat that in view of the urgency with which its *ex tempore* decision had been prepared overnight, it did not want to lay down a proposition on the interpretation of the Dublin III regime of authoritative precedential value.

55. The applicant in this case argues that, literally interpreted, Art. 29(3) permits a Member State to choose one, and only one, of the options (a) to (c) in providing for appeals against, or reviews of, transfer decisions. Regulation 7 of the 2014 Regulations provides that, in the case of an appeal to the tribunal under Reg. 6 of those Regulations, an applicant shall be entitled to remain in the State pending the outcome of the appeal. The applicant submits that the election that the State has made implies, as on one view the Court of Appeal found in *T.A.J.*, that the 'appeal or review' envisaged as being capable of having suspensive effect under Art. 27 is that before the tribunal and not any judicial review proceedings that may be taken after that.

56. In *T.M. v Refugee Appeals Tribunal* [2016] IEHC 496, (Unreported, High Court, 29 July 2016), Humphreys J addressed precisely that argument in the context of a transfer decision to which the basic time limit of six months was applicable in the following terms:

> '48 Article 29(1) provides that transfer shall be effected *'as soon as practically possible and at the latest, within six months of acceptance of the request…or of the final decision on an appeal or review where there is a suspensive effect'*.
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> 49 Assuming that, judicial review is not the appeal or review contemplated by art. 27, or indeed art. 29(1), the six-month period runs on a literal interpretation even if judicial review is sought and an injunction granted in such proceedings.
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> 50 Of course, EU law is not to be interpreted literally. Indeed, this very point has already been addressed in Case C-19/08, *Migrationsverket v. Petrosian* (29th January, 2009) in which it was held that where the legislation of a requesting member state provides

for suspensive effect of judicial proceedings, the period of implementation runs only from the time of a judicial decision which is no longer as such to prevent implementation of the transfer.

51 That is only common sense. It would be absurd and certainly contrary to the purposes of the regulation if the grant of an injunction pending the determination of a judicial review were to have the effect of determining the issue in favour of an applicant (including an applicant with no merits) by running down the clock on the six-month time limit.

52 Article 29(1) does not provide a defence to the transfer, not because judicial review is '*an appeal or review'* within that provision but because of a separate doctrine in accordance with the *Petrosian* decision, which is explained in some detail particularly at paras. 48 and 49, to the effect, that a state which permits such judicial review should not be in a less favourable position vis-à-vis the implementation of a transfer than a state which does not.

53 To my mind, this point is an *acte clair* in the light of the decision in *Petrosian*, so no question of a reference to the Court of Justice arises.

54 I appreciate that in the *ex tempore* decision in T.A.J., the Court of Appeal were minded to take the view that the six-month time period did not run from the end of the judicial review (para. 21) and therefore ran from the decision of the tribunal (para. 19). While para. 51 of *Petrosian* is cited without specific discussion (para. 22) it is not clear that the points made in particular at paras. 48 to 50 of *Petrosian* are taken on board in the *T.A.J.* decision, namely in effect that the taking of judicial review proceedings does stop the clock on a separate basis and not because judicial review is an effective remedy. Ryan P. stated quite expressly that the decision was not '*intended to be overly authoritative by way of precedential value'* (para. 26), and the actual outcome, namely upholding the discharge of an injunction during the currency of judicial review proceedings challenging a tribunal decision, is perfectly compatible with the manner in which I consider the regulation needs to be interpreted in the light of *Petrosian*. I do not consider therefore that the T.A.J. decision is a bar to the interpretation of the regulation which I have set out. The fact that *Petrosian* was decided under Dublin II rather than Dublin III in no way affects the principle of the decision or the reasons for it – in effect that it would be absurd and discriminatory to penalise a state for permitting judicial review of final transfer decisions. That is just as applicable to Dublin III as to predecessor schemes.'

57. For additional clarity, it may be helpful to set out the full text of the relevant passage from the judgment of the European Court of Justice in Case C-19/08 *Migrationsverket v Petrosian* ECLI:EU:C:2009:41:

’48 In the first place, it is clear that the Community legislature did not intend that the judicial protection guaranteed by the Member States whose courts may suspend the implementation of a transfer decision, thus enabling asylum seekers duly to challenge decisions taken in respect of them, should be sacrificed to the requirement of expedition in processing asylum applications.

49 Those Member States which wished to introduce appeal remedies liable to lead to decisions having suspensive effect in the context of transfer procedures may not, for the sake of meeting the requirement of expedition, be placed in a less favourable situation than those Member States which did not deem it necessary to do so.

50 Thus, a Member State which, in the context of transfer procedures, has decided to introduce various appeal remedies, including ones having suspensive effect, and for that reason had the time available to it to proceed with deportation of the asylum seeker reduced by the amount of time necessary for the domestic courts to rule on the merits of the case, would be placed in an awkward position, since, if it is unable to organise the transfer of the asylum seeker within the very brief period between the judicial decision on the merits of the case and the expiry of the time-limit for implementation of the transfer, it runs the risk, pursuant to Article 20(2) of Regulation No 343/2003 – under which the acceptance of its responsibility by the requested Member States lapses once the time-limit for implementation of the transfer has expired – of becoming definitively the Member State responsible for processing the asylum application.

51 It follows that an interpretation of Article 20(1)(d) of Regulation No 343/2003, laying down the starting point for calculating the period granted to the requesting Member State for proceeding with the transfer of an asylum applicant, cannot lead to a finding that, for the sake of observing Community law, the requesting State must disregard the suspensive effect of a provisional judicial decision taken in the context of an appeal capable of having such effect, which it nevertheless wished to introduce into its domestic law.

52 Regarding, secondly, observance of the principle of procedural autonomy of the Member States, the Court notes that, if the interpretation of Article 20(1)(d) of Regulation No 343/2003 to the effect that the period for implementation of the transfer begins to run as from the time of the provisional decision having suspensive effect were to prevail, a national court wishing to reconcile compliance with the time-limit with compliance with a provisional judicial decision having suspensive effect would be placed in the position of having to rule on the merits of the transfer procedure before expiry of that time-limit by a decision which may, owing to lack of sufficient time granted to the courts, have been unable to take satisfactory account of the complex nature of the proceedings. As rightly pointed out by some of the governments and the Commission in their observations submitted to the Court, such

an interpretation would run counter to that principle, as upheld in the case-law of the Community Courts (see, to that effect, Case C 13/01 *Safalero* [2003] ECR I-8679, paragraph 49, and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39).'

58. The applicant argues that it is necessary to revisit the decision of this Court in *TM* in light of the more recent judgments of the ECJ in Case C-670/16 *Mengesteab v Bundesrepublik Deutschland* ECLI:EU:C:2017:587 and Case C-201/16 *Shiri v Bundesamt für Fremdenwesen und Asyl* ECLI:EU:C:2017:805. I do not accept that. While it is clear that, in *Mengesteab*, the ECJ clarified that an applicant for international protection may rely on the expiration of the period permitted for one Member State to make a take charge request to another Member State under Reg. 21(1) of the Dublin III Regulation in challenging a transfer decision and that, in *Shiri*, the ECJ further clarified that an applicant may rely on the expiry of the six-month period defined in Art. 29(1) and (2) of that Regulation in mounting such a challenge, neither decision deals with the proper interpretation of Art. 27(3) concerning the suspensive effect of any appeal or review for which a Member State may provide in its national law.

59. Thus, I am satisfied that, for the purpose of Art. 29(1) of the Dublin III Regulation, which stipulates that the six month time limit for carrying out a transfer runs 'from the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3)', the injunction granted in these proceedings does have such effect in accordance with an appropriately teleological interpretation of Art. 27(3). Further, I am satisfied, just as Humphreys J was in *TM*, that the provision is *acte clair* so that a preliminary reference to the ECJ is not warranted.

60. Quite separately, I have come to the conclusion, reluctantly but firmly, that these proceedings are an abuse of the process of the court and that they attract the application of the principle against abuse of rights under European Union law. I have already described what I consider to be the breaches of the duty of candour that were entailed in the application for an interim *ex parte* injunction that was made on 11 August 2017.

61. In brief summary, they comprised the following:

(a) The court was told that the Minister had taken no steps to carry out the transfer of the applicant between 18 April 2016 and 5 August 2017, in circumstances where either the applicant knew or, at the very least, should have known (had the necessary and appropriate inquiries been conducted by him or on his behalf) that the transfer had been frustrated by his own failure to comply with his obligations under the Refugee Act.

(b) The court was not told that the Superintendent Registrar in Drogheda, County Louth, had determined on 5 September 2016 that the proposed civil marriage between the applicant and the EU citizen with whom he claimed to be in a durable relationship,

duly attested, was a marriage of convenience and that the civil registration of that marriage had been refused on that basis.

(c) The court was not told on 11 August 2017, that the effect of the interim *ex parte* injunction to restrain the transfer of the applicant that was being sought on that date would be relied on, if granted, as a separate – and, ultimately, the only – basis for challenging the lawfulness of that transfer.

62. For the avoidance of doubt, I reiterate my conclusion that there is no merit in the applicant's claim that his transfer to the United Kingdom would breach Reg. 25(7) of the 2015 Regulations, whereby the removal of a person who has made an application for the review of a removal order is suspended until a decision on that application has been made. The applicant was never the subject of a removal order because the applicant never succeeded in establishing an entitlement to derived free movement rights based on his relationship with a Union citizen. Rather, the applicant was facing a proposal to make a deportation order against him as a third country national.

63. Although the applicant wisely did not pursue that argument at the hearing of the application, he does return to the misconception on which it was based in raising the separate argument that his personal misconduct, however egregious, cannot deprive him of his entitlements under European Union law. For that purpose, he relies on the decision of the ECJ in Case C-109/01 *Secretary of State for the Home Department v Akrich* ECLI:EU:C:2003:491 (at para. 61) to argue that the applicant's conduct or behaviour 'is not relevant to an assessment of their legal situation by the competent authorities'. That partial quotation is itself less than fully candid. The complete quotation, from the third indent of that paragraph of the judgment is:

> 'Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State.'

64. As the applicant is well aware, the relevant authorities in this State do not accept that his marriage is genuine. A marriage of convenience is an abuse of rights under European Union law. Further, I am satisfied that the manner in which the applicant sought, and obtained, an interim *ex parte* injunction was an abuse of his right to challenge a decision on the application of the appropriate time-limits under Art 27(3) and Art. 29(1) and (2) of the Dublin III Regulations.

65. Thus, even if the applicant were strictly entitled to the relief he claims (although I have held that he is not), I would have dismissed these proceedings as an abuse of the process of the court and as an abuse of rights contrary to European Union law.

Conclusion

66. The proceedings are dismissed.