THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 408 J.R.]

BETWEEN

T.M.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL,

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

AND

REFUGEE APPLICATIONS COMMISSIONER

NOTICE PARTY

AND

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 433 J.R.]

BETWEEN

B.S. AND R.S.

APPLICANTS

AND

REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

AND

REFUGEE APPLICATIONS COMMISSIONER

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

Facts in relation to Mr. M.

1. Mr. M. arrived in the State through the U.K. on 10th December, 2014, and claimed asylum the following day. The Refugee Appeals Tribunal subsequently found that he gave "*completely untrue*" answers during the course of his asylum claim.

2. On 18th December, 2014 the State sent a request for information to the U.K. under art. 34 of Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26th June, 2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (recast) (the "Dublin III" regulation).

3. The U.K. replied to this request for information on 23rd January, 2015. On 10th March, 2015, the State sent a request to the U.K. to take charge of the asylum claim of Mr. M. pursuant to the regulation.

4. On 7th April, 2015, the U.K. replied agreeing to take charge of Mr. M.

5. On 28th April, 2015, despite being in the State for only four months, Mr. M. went through a ceremony of marriage with a Latvian woman in the State. How it was possible to do this given the statutory requirement for three months' notice of marriage has not been explained.

6. Following an interview on 21st March, 2015, the Refugee Applications Commissioner decided on 19th May, 2015 to transfer the applicant to the U.K. He appealed to the tribunal on 8th June, 2015.

7. On 30th June, 2015, the tribunal decided to uphold the decision of the Commissioner to transfer Mr. M.

8. Leave to seek judicial review of that decision was granted on 13th July, 2015, together with an interim injunction.

9. On 22nd July, 2015, Mr. M. applied for permission to remain in the State on the basis of his marriage to an EU national.

10. On 1st October, 2015 the applicant was granted permission to remain in the State pending the determination of his application for a right of residence based on his marriage.

11. On 29th October, 2015, the State having originally applied to set aside the injunction, did not pursue this application and the injunction restraining Mr. M.'s transfer was permitted to continue pending the determination of this application.

Facts in relation to Mr. and Mrs. S.
12. In December, 2014, Mr. and Mrs. S. came to the State through the U.K. in possession of false U.K. visas. They claimed asylum here on 16th December, 2014.

13. A request for information under art. 34 of the Dublin III regulation was sent on 15th January, 2015. Mr. and Mrs. S admitted that they had travelled through the U.K. but failed to acknowledge having been in possession of a U.K. visa.

14. The U.K. replied to the art. 34 request on 12th February, 2015. This gave rise to a request by the State to the U.K. to take charge of the asylum application on 16th March, 2015. The U.K. replied agreeing to do so on 13th April, 2015.

15. On 19th May, 2015, the commissioner decided to transfer Mr. and Mrs. S. to the U.K. They appealed to the Refugee Appeals Tribunal on 8th June, 2015. The tribunal upheld the Commissioner's decision on 14th July, 2015.

16. On 27th July, 2015, leave to seek judicial review of that decision was granted together with an injunction restraining the transfer of the applicants before 19th October, 2015.

17. On 21st December, 2015, the respondents agreed to continue the injunctive relief until the determination of the proceedings.

Are the transfer decisions invalid because the information request failed to state the grounds on which it was based contrary to art. 34 of the Dublin III regulation?
18. Ms. Sunniva McDonagh S.C. (with Mr. James Buckley B.L.), in a very able argument for the applicants submitted that the transfer decisions were invalid because in each case the request for information which preceded them was made without stating the "*grounds*" on which it was based as required by art. 34(4) of the regulation.

19. She relies on art. 27(1) of the regulation which guarantees an "*effective remedy…against a transfer decision*".

20. I will take the opinions of the Advocate General in Case C-155/15, *Karim v. Migrationsverket* (17th March, 2016) and Case C-63/15, *Ghezelbash v.Staatssecretaris van Veiligheid en Justitie* (Netherlands) (17th March, 2016) as a starting point. Those opinions state that the remedy must be such as to "*verify whether the criteria in chapter III have been correctly applied in [the applicant's] case"* (para. 91). Chapter III of the regulation covers arts. 7 to 15. The Court of Justice has recently upheld this approach in both cases in judgments, both delivered on 7th June, 2016 (see paras. 22 and 23 of *Karim* and paras. 30 to 61 of *Ghezelbash*).

21. The fact that the Advocate General has specifically identified arts. 7 to 15 as being subject to review strongly suggests that other articles of the regulation are not properly matters for review at the suit of an individual aggrieved applicant. For example, it is clear that a decision of another state to accept a transfer is not a transfer decision and is not subject to review under reg. 27(1) (see Karim, opinion of the Advocate General at para. 42).

22. In its decision in Ghezelbash, the court said at para. 51 that *"[i]t follows from the foregoing that the EU legislature did not confine itself, in Regulation No. 604/2013, to introducing organisational rules simply governing relations between Member States for the purpose of determining the Member State responsible, but decided to involve asylum seekers in that process by obliging Member States to inform them of the criteria for determining responsibility and to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria, and by conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process".* What the court is speaking of here is the correct application of "*the criteria for determining responsibility*". It is not acknowledging a right of action on the part of an asylum seeker in relation to all aspects of the Dublin regulation.

23. It would probably be helpful if I clarify one point about the "*effective remedy*" envisaged by art. 27 of the regulation. In *T.A.J. v. Refugee Appeals Tribunal* (Unreported, Court of Appeal, *ex tempore*, 8th December, 2015), the Court of Appeal proceeded on the premise, adopted for the sake of argument, that judicial review was not an effective remedy as envisaged by the regulations. Indeed, Hogan J. in concurring *ex tempore* comments suggested that the question of what the effective remedy was could be the subject of a reference to the Court of Justice in another case. However, having had a perhaps more leisurely opportunity to consider the matter than was open to the Court of Appeal in determining an interlocutory injunction *ex tempore* in the *T.A.J.* case, in circumstances where Ryan P. expressly said that the decision was not to be regarded as definitively determining such an issue, it seems to me that the position in fact is quite clear and there is no necessity for a reference to the Court of Justice. Judicial review is not the effective remedy against a transfer decision. Rather the commissioner's decision to transfer an applicant is subject to a full appeal on all questions of fact and law to the tribunal. That appeal to the tribunal constitutes the effective remedy envisaged by art. 27(1) of the regulation. These applicants have had their effective remedy. They have simply been unsuccessful in that regard. Losing your case does not mean that you are denied an effective remedy.

24. In any event tribunal decisions are also of course subject to judicial review and the obiter comments in *T.A.J.* now need to be viewed in the light of the recent judgment of Hogan J. in *N.M (D.R.C.) v. The Minister for Justice, Equality and Law Reform* [2016] IECA 217 (Unreported, Court of Appeal, 14th July, 2016), to the effect that the modern law of judicial review may be viewed as an effective remedy.

25. It seems to me to be of some importance that art. 34, which is said to have been breached, is located not in chapter III of the regulation but in chapter VII, which is headed "*Administrative Cooperation*". It is part of a series of provisions which is directed towards member states rather than applicants. A breach of art. 34 by failing to state the grounds of a request is not an infringement of the rights of an applicant. If anything it is an inconvenience to the requested member state, who is being asked to provide information without having been given a more full and complete statement of the reasons why it is sought. But that does not give rise to any cause of action on the part of an applicant.

26. Nor does such a request breach the data protection rights of any applicant concerned. The State clearly has a right pursuant to the regulation to make information requests to other States. Any transfer of data that is involved in the exercise of such an entitlement is therefore lawful.

27. In any event even if there was a breach of data protection rights, art. 34(9) sets out the remedies, namely correction or erasure of the data.

28. Transfer of such information to give effect to the functions of state bodies is clearly within the parameters of ss. 2A(1)(c)(ii),(iv), or (d) of the Data Protection Act 1988, particularly having regard to ss. 9A(1) and (8) of the Refugee Act 1996 (albeit that the latter subsection refers to the precursor of the Dublin III regulation rather than the regulation itself, but general principles of legislative interpretation mean that a reference to any legal instrument should be read as reference to a replacing instrument).

29. In any event, any breach involved is purely technical. The Minister is not obliged to furnish detailed individual grounds for any particular information request. It is perfectly permissible within the regulation to furnish general grounds, the obvious one being that given Ireland's geographical location, and the lack of direct flights to many destinations outside Europe, it is reasonable to infer that there is a possibility that any individual asylum seeker may have travelled through the U.K. Known patterns of population movement and travel are perfectly legitimate grounds.

30. In the present case the Minister's views as to the necessity for an information request were reinforced by further information about particular recent population movements from particular groups of people coming from the Indian subcontinent region.

31. While of course there is force in the view expressed by McDermott J. in *T.A.R. v. Minister for Justice and Equality* [2014] IEHC 385 (Unreported, High Court, 30th July, 2014) at para. 25 that the court should be "circumspect" in allowing reasons already given to be supplemented in the course of proceedings, in principle it is not an impermissible option (see my decision in *RPS Consulting Engineers Ltd. v. Kildare Co. Council* [2016] IEHC 113 (Unreported, High Court, 15th February, 2016) at para. 110, citing *English v. Emery Reimbold & Strick Ltd*. [2002] EWCA Civ 605), and in this case the additional material only reinforces what is in any event obvious from geography and transportation links and known population movements more generally.

Allegation that the transfer decision is invalid because the fingerprint data provided did not comply with art. 34(2)(c) of the regulation

32. Ms. McDonagh argues that the identity information provided by the U.K. did not comply with the regulation because art. 34(2)(c) provides for the furnishing of information necessary for establishing the identity of the applicant including fingerprints processed "*in accordance with Regulation (EU) No. 603/2013*", which relates to the recast "Eurodac" regulation, which provides for a system for the collection of fingerprint data (Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26th June, 2013 on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale I.T. systems in the area of freedom, security and justice (recast)). In the present case, the fingerprint information was not processed pursuant to this regulation.

33. Mr. Robert Barron S.C. (with Ms. Sinead McGrath B.L,) firstly makes the technical point that it has not been proven that there was no Eurodac inquiry in this case.

34. Secondly, and I think more pertinently, he says that this particular complaint was not made to the tribunal as a ground for quashing the transfer decision and therefore it is not appropriate to grant relief by way of judicial review on a point that was not argued in the forum below. I would accept the correctness of that submission.

35. Thirdly, he submits, again I think correctly, that there is in fact no breach of art. 34, because it is a matter for the receiving State to decide what information to furnish. Article 34(2)(c) only permits the furnishing of information "including" fingerprints processed under the Eurodac system but that does not preclude other information being furnished, such as fingerprints taken outside of the Eurodac process.

36. Finally, it seems to me that even if there was a breach of art. 34, which I do not accept, this does not confer any rights on the applicant. Again, art. 34 is located in the "administrative preparation" chapter of the regulation and is addressed to relationships between states. Any breach of the provision does not invalidate a transfer decision. No conflict or uncertainty in the interpretation of this provision has been demonstrated rendering the matter suitable for a reference to the Court of Justice.

Is the transfer decision invalid because the take charge request was not made "as quickly as possible" contrary to art. 21(1) of the regulation?

37. Article 21(1) of the regulation provides that a member state may, as quickly as possible and, in any event, within three months of the date on which the application was lodged request another member state to take charge of an applicant.

38. The provision is located in chapter VI of the regulation which relates to "*procedures for taking charge and giving back*". Again, chapter VI is a procedural part of the regulation addressed to member states and not designed to confer rights on an applicant in such a way as to invalidate a transfer decision made in breach of those provisions.

39. While the three month element of art. 21(1) was challenged before the tribunal, that aspect was not pursued before me. The tribunal found that pursuant to the Euratom regulation, (Regulation (EEC, Euratom) No. 1182/71 of the Council of 3rd June, 1971 determining the rules applicable to periods, dates and time limits), art. 3(2), the date of the request should be excluded from the calculation of the three month period. Thus, in the case of Mr. and Mrs. S., the request was sent on 16th March, 2015, and this was held, correctly, to have been within three months of the asylum claim made on 16th December, 2014.

40. It is true, however, that the tribunal member referred to the delay in the take charge request as being "*not excessively long*" as opposed to having taken place "*as quickly as possible*". This minor verbal slip does not invalidate the decision. Like any EU instrument, the regulation must be given a purposive interpretation, and it would undermine the purpose of the regulation if the transfer decisions were capable of being held to be invalid as a result of a modest delay in implementation of this type.

41. In any event, in my view, the three month limit is designed to protect the member state on a purposive interpretation and not the applicant.

42. In Case C-620/10, *Migrationsverket v. Kastrati, Advocate General Trstenjak* (in her opinion of 12th January, 2012) stated at para. 28 that the primary purpose of the predecessor regulation (Council Regulation (EC) No. 343/2003 of 18th 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) was the determination of the responsible member state and at para. 29 that "*the objective of Regulation No. 343/2003 [Dublin II] is not to create procedural safeguards for asylum seekers in terms of the determination of conditions for the acceptance or rejection of their asylum applications. Rather that Regulation primarily governs the allegation of the duties and tasks of the Member States amongst themselves".*

43. Similar views were expressed by Advocate General Jääskinen in Case C-4/11, *Bundesrepublik Deutschland v. Kaveh Puid* (18th April, 2013) at para. 58 and by Advocate General Cruz Villalón in Case C-394/12, *Abdullahi v. Bundesasylamt* (11th July, 2013).

44. To my mind, the consequence of the fact that the bulk of the regulation is addressed to the member states rather than to the protection of applicants as such is that a receiving member state can voluntarily agree to take back an asylum applicant even after the expiry of the periods referred to in the regulation. This is not a breach of any entitlement on the part of an applicant to have an asylum application determined promptly, even if such a right existed, because it is the determination of a purely procedural matter, namely which authority will adjudicate on the asylum claim. If following the expiry of a three-month period from the making of an asylum claim, there was neither a take charge request nor any visible action domestically on the claim, it may be that a legal duty to take one step or the other would arise. But legal duties imposing significant administrative burdens on public bodies cannot reasonably be expected to be put in motion without affording a reasonable time for doing so, in the absence of present circumstances which required immediate action.

45. Therefore, even if either request in the present cases was not made "as quickly as possible", that does not invalidate the transfer if the receiving state is still prepared to take the applicants back. The same position would arise even if the request was made outside the three-month period, providing that the requested state was still willing to act on it. In exercising a sovereign right to transfer charge of an applicant, where this is not strictly required by EU law, it is doubtful whether such a decision is reviewable in EU law terms or not, but assuming (which I would not accept) that it is, no uncertainty or conflict in interpretation has been shown such as to render the lawfulness of such a transfer an appropriate matter for reference to the Court of Justice.

Is the transfer of Mr. M. invalid because he has a residence document pursuant to art. 19(1) of the regulation?
46. The argument that Mr. M. cannot be transferred because he has a "residence document" under art. 19(1) of the regulation is based on a simple misconception. All Mr. M. has is a temporary permission pending the determination of his application for residency and not a residence document. Article 2(l) excludes from the definition of a residence document "*residence authorisations issued during the period required to determine… an application for a residence permit*". Mr. M. falls into that category.

Is the transfer decision in Mr. M.'s case inoperable because of the passage of more than six months of the determination of the appeal?
47. This issue arises only in the case of Mr. M. because Mr. and Mrs. S. gave an undertaking not to rely on this point as a condition of the grant of an injunction in their case.

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"*.

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.

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.

55. Independently, of the foregoing, the language of art. 29 is that if the six-month time period runs out, the receiving member state is "*relieved of its obligations*". That form of language does not preclude voluntary acceptance of the transfer even outside the six-month period. Again, in my view, the six-month period, is designed to protect member states rather than an applicant and while a member state cannot be required to accept a transfer after the six-month period, it is not precluded from doing so voluntarily. Such a voluntary agreement does not create any actionable right on the part of an applicant to bring proceedings to invalidate the transfer by reason of an alleged breach of the regulations. There is no breach of regulation where member states agree voluntarily to operate

the system despite the expiry of one or other of the administrative time limits involved.

56. The applicants in supplementary submissions state that "*the legal problems are that (a) it is in breach of the Dublin III Regulation as interpreted by the Court of Appeal, and the Applicant has a right to challenge such a breach of the rule (See,* Ghezelbash & Karim decisions); *and (b) there is no right under domestic law to effect a transfer – it can only be done under EU law".* This admirably succinct passage is however bristling with misconceptions.

57. Firstly, I do not accept that transfer after 6 months is "*in breach of*" the Dublin III regulation. The language of "*breach*" implies a mandatory rule, action contrary to which is unlawful. Dublin III lays down a time limit for transfer, to be sure, but it does not make transfer outside that time limit unlawful. It is therefore inappropriate to speak of "*breach*" in this context.

58. Secondly, insofar as it can be said that transfer outside the six-month period is not in accordance with Dublin III, any periods during which an applicant sought judicial review must be discounted. This is clear from *Petrosian* and from the rationale I have referred to above. I appreciate that the crucial qualification in the applicant's submission is "*as interpreted by the Court of Appeal*", but I have very respectfully set out the reasons why I consider it is open to me to take an approach which might be thought to differ from some of the *obiter* comments expressed in that court. I emphasise that those comments were *obiter* because of the fact that the actual decision of that court – to uphold the discharge of an injunction – is perfectly compatible with the approach I am upholding.

59. The third, and fundamental, misconception is that *Ghezelbash* and *Karim* establish a principle that an applicant can challenge a breach of any rule set out in Dublin III. That is incorrect. The applicants can only challenge a breach of the criteria for transfer. Other provisions of the regulation are clearly addressed to member states.

60. Finally, the applicants say that there is no right under domestic law to transfer, and it can only be done under EU law. This is a misconception. EU law, important as it is, is only an overlay on the inherent rights of the states themselves. A state has an inherent right to expel a non-national, and another state has an inherent right to receive him or her, ignoring limited legal qualifications such as *refoulement.* Two EU member states have a perfect legal entitlement to agree on a transfer of an asylum seeker even outside the precise strictures of the regulation.

61. The point under discussion here has already been definitively rejected by the Federal Administrative Court of Germany in a decision of the First Senate of 27th October, 2015 (1 C 32.14 BVerwGE I). The court held, in the context of a failure to make a take-back request within three months, that such a time limit provision of Dublin III creates "no subjective rights" ("*keine subjektiven Rechte*") for an asylum seeker. I respectfully agree with that conclusion. As the approach I am taking is consistent with the jurisprudence of Germany's highest administrative court, I do not consider that there is any conflict or uncertainty such as to make a reference to the Court of Justice appropriate.

Was the decision in Mr. and Mrs. S's case invalid due to an incorrect finding that a fingerprint match constitutes "proof" of a prior claim in the U.K.?

62. Ms. McDonagh submits that there was an incorrect finding that a fingerprint match constituted "proof" as defined by list A(1)(5) of annex II of regulation 1560/2003. This argument is based on a simple misconception. The list of proofs includes "*reports/confirmation of the information from the Member State which issued the visa*". There is no specific form in which these reports or confirmation must be provided. A fingerprint match is well capable of constituting a report or confirmation as so defined and therefore of constituting proof of a prior visa application.

Should the application be dismissed in the discretion of the court?

63. As a preliminary matter under this heading, Ms. McDonagh submits that the court cannot exercise an independent discretion on the application and can only deal with the findings of the tribunal member. I would entirely reject that submission. The court in dealing with a discretionary remedy as exercising its own discretion in the light of all of the facts and circumstances as they appear to the court at the time at which the question falls to be considered. The court is not bound by failure on the part of a decision-maker to make any particular adverse findings against an applicant. *T.A.R.* at para. 25 does not establish any principle to the contrary as submitted; it does not even deal with this issue.

64. It is clear that both applicants were responsible for significant falsehoods or omissions in their asylum applications. Mr. Barron correctly submits that the applicants "*cannot say there is no lawful duty to tell the truth*" in an asylum application. The furnishing of incorrect information in an asylum application is fraud and is an offence under s. 20 of the Refugee Act 1996, as well as under the Criminal Justice (Theft and Fraud Offences) Act 2001.

65. The tribunal found, clearly correctly, that Mr. M. had provided false information in his asylum claim. Likewise, Mr. and Mrs. S. claimed (at question 36 of their asylum questionnaire) that "*we entered without papers*", which was clearly false.

66. Ms. McDonagh in supplementary submissions makes the rather circular argument that dishonesty cannot be disqualifying because since honest applicants will not be able to benefit from non-compliance with Eurodac rules due to their honesty, the net effect would be that the Eurodac rules would never have to be applied. This argument is a form of meritless verbal paradox. Honest applicants can fend for themselves. We are dealing here with applicants who failed in their clear duty of candour.

67. I appreciate that there are some cases where unmeritorious applicants have not been refused relief, but few enough of them deal with cases where fraud or lack of candour went to the heart of the underlying application being made. Ms. McDonagh submits that in *Kadri v. The Governor of Wheatfield Prison* [2012] IESC 27 (Unreported, Supreme Court, 10th May, 2012), an applicant who had engaged in "*egregious behaviour*" (para. 28) was not refused relief. However, that was a case about the lawfulness of detention and is not to be generalised in the manner submitted. There are numerous cases where the court declined to allow a person to profit from their own wrong doing (e.g., per Hogan J. in *Robertson v. The Governor of Dóchas Centre* [2011] IEHC 24 (Unreported, High Court, 25th January, 2011)). In any event, merely because one particular applicant in one case is not penalised for misconduct of one kind or another does not mean that no applicant in any case can ever have their conduct scrutinised under the heading of the discretion of the court.

68. A purposive interpretation of the regulations is also of importance given the EU context. There can be no doubt but that the purpose of the 2013 regulation is not to provide protection to applicants who seek to defeat or defraud the asylum and immigration systems of member states.

69. In these cases, I do not consider that the applicants are entitled to relief on the merits in any event. But if I am wrong about that, I would certainly refuse relief on a discretionary basis due to their abuse of the asylum and immigration systems.

70. While, of course, there are some cases, such as the imposition of criminal liability in the absence of jurisdiction, where a court should not find against an applicant on discretionary grounds (*State (Vozza) v. Ó Floinn* [1955] I.R. 227), this is not such a case. The applicants are not being deprived of the right to claim asylum under the Geneva Convention, or indeed within the European Union. All that is happening is that in accordance with established EU law, the appropriate member state to determine their asylum claim is being asked to do so. That should now be allowed to happen.

Order

71. For the foregoing reasons, I will order in each case that the application be dismissed. I will discuss with counsel whether the injunctions should be discharged at this point.