THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 725 J.R.]

BETWEEN

M.E.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 17th day of July, 2017

Issues

1. Leave was afforded by Humphreys J. in the within matter on 21st October, 2016 in enabling the applicant to apply for an order of *certiorari* against a decision of the first named respondent of 17th August, 2016 confirming the prior decision of the Refugee Applications Commissioner of the 11th March, 2016, that the applicant's application for asylum be transferred to the United Kingdom under the provisions of Dublin III. The applicant's claim is based on the Article 17 discretion within Dublin III. In this regard the applicant asserts that the first named respondent had jurisdiction in respect thereof, was obliged to exercise it and if such discretion is not exercised the applicant complains that he will be left without an effective remedy under Article 47 of the Charter of Fundamental Rights of the European Union.

2. It is common case that the applicant did not in fact raise the issue of Article 17 either before ORAC or before the Refugee Appeals Tribunal and therefore in the within proceedings the claim of the applicant in this regard is to the effect that regardless of whether or not the issue of Article 17 discretion was raised the first named respondent was obliged to consider whether or not to exercise Article 17 discretion. Further, the applicant asserts, notwithstanding that the issue was not raised as aforesaid, it is possible to raise the issue in a judicial review against the RAT.

3. A further issue arose at the trial of the action on the 28th June, 2017 namely the motion of the applicant of 18th May, 2017 seeking to substantially amend the statement of grounds herein.

4. Both issues identified aforesaid were contested by the respondent at the hearing.

Brief background

5. The applicant is a Libyan National and was born on the 3rd June, 1987. He left Libya in or about the 2nd August, 2010 and travelled to the UK where he stayed for approximately five years. On 24th September, 2012 he was issued with a UK office card. On 16th December, 2015 he arrived in this jurisdiction and applied for asylum.

6. It is in fact the case that on 21st October, 2012 the applicant had previously applied for asylum in the UK and was refused. He reapplied on 12th October, 2015 and was again refused.

7. His application for asylum in this State was made on 17th December, 2015 and ultimately culminated in the order of the ORAC of the 11th March, 2016 to the effect that the applicant should be transferred to the UK. The applicant appealed this order by appeal on 1st April, 2016. In this appeal the applicant's raised three points namely that rights pursuant to Article 4 of Dublin III and Article 29 of Regulation 603/2013 were breached and this was effectively a data protection issue. The applicant also complained that the take back request and reply was based on an incorrect Article within Chapter 3 of Dublin III and further states that the transfer decision incorrectly stated that Article 3 applied. In the events an order was made on appeal by the first named respondent bearing date 17th August, 2016 affirming ORAC's decision to transfer the applicant to the UK. None of the grounds of appeal to the first named respondent appear relevant in the within judicial review proceedings.

8. It should be noted that the applicant's then solicitor by letter of 26th August, 2016 communicated with the Minister indicating that the applicant required two operations – one to remove a blockage and one to fit a pacemaker. It is clear from the documents furnished that the applicant has had a heart issue since aged 3 and was treated for same prior to ever leaving Libya. In the letter a request was made that the transfer order should not be enforced for a period of time to allow the applicant to have his operation and to recover from same. A further request was made that based on the Refugee Appeals Tribunal's refusal to exercise jurisdiction under Article 17 of Dublin III that the Minister make a decision as to whether discretion will be exercised to accept in this jurisdiction the applicant's claim for asylum in view of his very serious medical issues which are currently being treated. The response of the Minister of the 29th August, 2016 was to the effect that all the applicant's medical data would be forwarded the UK prior to his transfer and there is no mention whatsoever of Article 17 in this response.

Moot

9. Following the decision in *Un* the applicant suggested the outstanding issue in the existing statement of grounds was rendered moot, nevertheless because this was listed as a test case and the respondent advises that there are several other cases raising the instant issue and it is in the interest of justice to deal with same. The position with regard to mootness was outlined by this Court in *B.A. v. Minister for Justice* [2017] IEHC 42 :-

> "The respondent in fact made a decision on the 12th October, 2016. Therefore the issue of mandamus was rendered moot. The respondent sought, notwithstanding that the issue of mandamus was rendered moot, that the court would nevertheless deal with the issue of mandamus as same would be relevant to other cases in which Mandamus has been sought. In this regard the parties accepted the Supreme Court decision of 16th October, 2012 in *Okunade v. Minister for Justice Equality & Law Reform* [2012] I.R. 152 as being relevant and establishing the principle that notwithstanding that although the application before the Supreme Court on appeal had become moot, that the issues might nevertheless be dealt with if the appeal was relevant to a significant number of other cases. Reference was also made to the Supreme

Court judgment of *Lofinmakin v Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274 to the effect that exceptional circumstances are required before a court will deal with a moot case. The parties also referred to the judgment of Humphreys J. of 29th July, 2016 in *I.R.M. & Ors. v. the Minister for Justice and Equality* [2016] IEHC 478 where at para. 101 of the judgment the Court summarised the principles including that a court can proceed to determine an issue that is strictly moot if the interests of justice so require."

Entitlement of an applicant to raise in judicial review matters which were not raised before the relevant decision maker
10. The applicant submission is to the effect that notwithstanding that Article 17 was not raised by the applicant either before ORAC or RAT nevertheless they now obliged to consider the Article 17 issue and therefore in turn the applicant is entitled to raise the Article 17 issue and the failure of the first named respondent to deal with same in judicial review. The applicant relies on the matter of *Mallak v. The Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297 and in particular paras. 69 and 71 thereof. This case deals with the requirements for reasons to be given even in the exercise of an absolute discretion. I cannot identify how the judgment in *Mallak* supports the applicant's proposition that the applicant to entitle to raise in judicial review a point which was not raised before the first named respondent.

11. The applicant also relies on the case of *McCarron v. Kearney* [2010] 3 I.R. 382 in particular para. 61 thereof which provides that it was well established where a statue confers a discretionary power the decision maker must exercise that discretion properly in each individual case. Again, I cannot see where this case is of any relevance to the applicant given that the relevant point was raised by the applicant before the relevant decision maker however was refused on the basis of a rigid application of a policy.

12. The final case relied upon by the applicant in this regard is the matter of *H.I.D. v. Refugee Applications Commissioner & Ors.* [2011] IEHC 33, in a judgment of Cooke J. The applicant draws the Court's attention to para. 50 thereof. In that para. the Court noted the power of the Tribunal under s. 16(6) of the 1996 Act to require further information or enquiries from the ORAC to meet the objectives envisaged by *inter alia* Article 8 of the Directive. The Court expressed satisfaction that this did not in any way compromise the independence of RAT. The Court noted that ORAC is responsible for the first stage examination and it is represented at the Tribunal hearing by a presiding officer to assist with the re-examination of its report. This para. of Cooke J.'s judgment concluded with the following:

> "Where, in order to reach a conclusion on a disputed issue or a matter of doubt, the Tribunal member directs that the ORAC conduct further enquiries or obtain further information, the RAT is doing no more than ensuring that the full examination of the asylum application is thorough and complete. The objective of the Procedures Directive is to ensure that the examination of applications culminating in the "final decision" is carried out according to the prescribed principles and standards and the investigative or inquisitorial obligation is not exclusive to the first instance stage."

13. I am satisfied that the above does not in fact support the contention now being made on behalf of the applicant as the comments made by Cooke J. aforesaid and the obligation of the Tribunal to conduct further enquiries or obtain further information is premised on a disputed issue or a matter of doubt. As aforesaid given that Article 17 was not raised there is no question of a disputed issue or a matter of doubt relative to Article 17 arising before the first named respondent which might oblige the first named respondent to investigate same. Furthermore of course Cooke J. was dealing with the actual consideration of the asylum application under the 1996 Act whereas in the instant circumstances the consideration was relative to the identification of the Member State responsible for dealing the asylum application.

14. The respondent resists the application of the applicant in respect of this issue on the basis of three cases as follows:

> (a) In the matter of *N.M.. v. Minister for Justice, Equality and Law Reform* [2016] IECA 217 paras. 52 and 53 thereof Hogan J. of the Court of Appeal was referring to the judgment of Barr J. in the High Court where he identified limitations in the judicial review process. Hogan J. states that Barr J. drew attention to limitations such as the fact that the Court could only annul the decision and remit the matter for further consideration and also observed that the Court was further confined to the information which was before the decision maker at the time of the decision. At para. 53 Hogan J. goes on to state that all of this in its own way is true. He states:
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> > "While the judicial review court cannot review the merits of the decision, it can nonetheless quash for unreasonableness or lack of proportionality or where the decision simply strikes at the substance of constitutional or EU rights. The court can further examine the conclusions reached and ensure that they follow from the decision maker's premises."
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> (b) The respondent relies on the judgment of Cooke J. in *I.S.O.F. & Ano. v. Minister for Justice, Equality and Law Reform & Ors.* [2010] IEHC 457 and in particular para. 10 thereof. The Court noted that when the validity of an administrative or quasi judicial decision comes before the Court on judicial review the decision itself is the Court's starting point and the basis on which it has been reached and the process by which it has been decided. The Court does not have before it an appeal against their decision and its jurisdiction is based upon the content of the decision and the law applicable thereto. Cooke J. noted that it was the duty of the Court to assess by reference to the evidence information and documentation available to or procurable by the decision maker at the time. The Court does not take into account new information or evidence.
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> (c) The respondent refers to the case of *Imoh. v. Refugee Appeals Tribunal* [2005] IEHC 220 being a judgment of Clarke J. in the High Court. In that case when the applicant appealed to the RAT no ground of appeal was put forward on the basis of any failure on the part of ORAC to deal with forced marriage and the Court found that in those circumstances it could not properly be said that the forced marriage issue was in any real sense before the RAT. Accordingly it was hardly surprising that it did not come up as an issue at the hearing before RAT and is not therefore dealt with in the decision of RAT. The Court concludes with the following statement:
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> > "I find it hard to see how any appropriate criticism can be made of the RAT under this heading. Where, as here, the applicant chooses not to raise the issue in the notice of appeal or to refer to the matter at the appeal hearing I do not believe that there is any basis for suggesting that there was any inappropriate failure on the part of the RAT to deal with the matter in the course of its determination."

15. By reason of the foregoing submissions I am satisfied that case law on point demonstrates that in judicial review of an

administrative decision it is not appropriate to complain of an issue which has not been raised before RAT and there is no lapse on RATs part in not dealing with such an issue, which had not been raised (which presumably was deliberate in view of the content of the solicitor's letter), in its decision.

Amendments

16. In his application to amend the statement of grounds the applicant seeks extensive amendments. A considerable number of these amendments relate to the first named respondent in dealing with the Article 17 issue. The applicant acknowledges that in a recent decision of this Court in *U.N. v. IPAT & Ors.* this Court held that the Article 17 discretion was in fact vested in the Minister for Justice, Equality and Law Reform/the Oireachtas and in these circumstances the applicant is merely seeking to raise the issues so that if necessary same can be appealed to the Court of Appeal in accordance with the judgment of Cross J. delivered on 3rd February, 2012 in *O.J. v. Minister for Justice, Equality and Law Reform & Ors*. The respondents response to this application relative to Article 17 before the first named respondent is simply that as the issue of Article 17 was not raised the amendments in respect thereof relative to the first named respondent should not be allowed.

17. In view of this Court's decision in respect of the first issue which has arisen at para 15 hereof I am satisfied that it is not appropriate to allow amendments relative to the issue of Article 17 discretion before the first named respondent.

18. A further issue arising in the amended statement of grounds is Article 8 Family Life Rights or Private Life Rights however, again, this issue was not raised either before ORAC or the first named respondent and therefore it would be inappropriate to allow any amendment as against the first named respondent under the heading of Article 8 rights.

19. By reason of the foregoing the outstanding amendment concerns relief No. 9 where the applicant is seeking a declaration that the second and third named respondents have acted unlawfully in failing to ensure that some person considered, or lawfully considered, the exercise of the discretion pursuant to Article 17 (1) in cases to date and this relief is supported by ground O which provides:

> "Insofar as the discretion referred to is to be exercised by the second named respondent (a position which is only recently been revealed in the proceedings) (which is denied) then the second named respondent acted unlawfully in ignoring the applicant's request that the discretion would be exercised in his favour and failing to address that request."

20. The test as to whether or not amendments would be allowed in judicial review proceedings was dealt with by the Supreme Court in the matter of *Keegan v. An Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570. In that case, it was stated that the issues to be considered would be arguability, explanation and the absence of prejudice on the respondent. It is noted that in allowing the amendments sought, the Supreme Court held that the applicant should be allowed to include the new ground in his statement of grounds and the balance of justice weighed in favour of granting the amendments. At para. 31 of the judgment of Fennelly J., the Court indicated that the object of the system is to strike a fair balance between the certainty and security of administrative decisions and the rights of persons affected by them who wished to contest them.

21. The issue of amendments was also dealt with by Humphreys J. in a judgment of 17th November, 2015, in the matter of *B.V. v. RAT & Ors* [2015] IEHC 725.

22. It is noted that at para. 24, Humphreys J. indicated that he did not think any great weight may be attached to whether the point is merely a modest expansion on the grounds or a major point such as an entirely new head of claim and he referred to the language used in *Keegan* suggestive of the view that a court should be more receptive to minor points, however, the actual result was very supportive of the proposition that major points can be accommodated as long as no irremediable prejudice arises.

23. The respondent counters that the judgment of Humphreys J. is under appeal and the respondent relies on the judgment of the Supreme Court in *Keegan*.

24. The respondent argues that at the date of institution of the proceedings the communications between the applicant's prior solicitors and the Minister were known and available and, therefore, should have been included in the original statement of grounds. The explanation given by the applicant for not including same was the fact that in a statement of opposition in the one case aforesaid bearing date 24th April, 2017, for the first time, and contrary to a previous view expressed on behalf of the Minister, the Minister has taken the view that it is the Minister and not ORAC and on appeal RAT, (now IPAT) who is vested with the discretionary powers identified in Article 17 of Dublin III.

25. The respondent suggests that the above explanation does not stand up to scrutiny and further suggests that when properly scrutinised, the facts reveal that in this case it is the fact that a new legal team have considered that they should pursue a ground not raised by the applicant's former legal team.

26. This assertion on the part of the respondent is not, in fact, accurate as on inquiry by the Court it transpires that the existing legal team had, in fact, instituted the judicial review proceedings.

27. In my view, in attempting to strike a fair balance between the certainty of administrative decisions and the persons affected by them to challenge them I must take into account the fact that in the past the Minister has indicated that it is ORAC and, in turn, RAT who are vested with the Article 17 discretion, however, lately identified, in the statement of opposition and grounding affidavit of Brian Merriman of 28th April, 2017, in the *Un* proceedings, that legal advice was secured and as a consequence the Minister was now satisfied that the Article 17 discretion was vested in the Minister was such an about and unexpected turn that it is reasonable that the applicant did not incorporate the request of the Minister for Article 17 discretion in the original statement of grounds.

28. Further, it appears that there are other outstanding cases in which the exercise of the discretion by the Minister or not having been invited to exercise the discretion is raised. Therefore, the issue would have to be dealt with by the Minister in those cases.

29. Accordingly, I am of the view that the fair balance to be struck between parties is to allow the applicant amend the initial statement of grounds including proposed relief No. 9 based upon proposed ground No. O of the new proposed statement of grounds.