

**THE HIGH COURT
JUDICIAL REVIEW**

2010 911 JR

BETWEEN

A. W.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered 2nd day of July, 2010.

1. This is an application made *ex parte* for an interim injunction to restrain the transfer of the applicant as an asylum seeker to the United Kingdom of Great Britain and Northern Ireland on foot of an order dated 17th June, 2010, made under the Dublin II Regulation.

2. The applicant is a native of Pakistan who claims to have arrived in the State on 30th December, 2009, having travelled with the assistance of an agent or trafficker and without identity documents, over land through Iran, Turkey and other unidentified states. He made an application for asylum here on 8th January, 2010. He completed the asylum questionnaire and was duly interviewed under s. 11 of the Refugee Act 1996.

3. Following the normal inter-state inquiries and an exchange of biographical details and fingerprints with the United Kingdom Border Agency, it was determined that the applicant had visited England in at least 2006 and 2008 and that he held a visa issued to him by the United Kingdom authorities on 26th September, 2008, valid for two years from that date.

4. By letter dated 28th May, 2010, the United Kingdom Border Agency responded to this State's request that the United Kingdom take charge of the applicant pursuant to the terms of the Dublin II Regulation. The letter said:

"Further to your recent correspondence I am writing to advise that the United Kingdom has reconsidered your request to take charge of the above named under the terms of Article 9.2 or 9.3 of Council Regulation EC No. 343/2003 of 18th February, 2003. Following positive identification from the applicant's fingerprints the United Kingdom will now accept the transfer of the above named for further consideration of their asylum application under the terms of Article 9.2." (The Council Regulation in question is the Dublin II Regulation).

5. The relevant provisions of Article 9 of the Regulation are as follows:

"(1) Where the asylum seeker is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for asylum.

(2) Where the asylum seeker is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for asylum, unless the visa was issued when acting for or on the written authorisation of another member state. ..."

6. If leave is granted in this case it is proposed to challenge the validity of the transfer order upon two specific grounds the first of which is that the order is invalid by reason of Article 16 (3) of the Regulation.

7. Article 16 (1) defines the obligations of a Member State responsible for examining an asylum application including the obligation to take charge of the examination of any asylum application lodged in another Member State. Article 16 (3) provides: "The obligations specified in paragraph 1 shall cease where the third country national has left the territory of the Member State for at least three months, unless the third country national is in possession of a valid residence document issued by the Member State responsible". It is argued that this applicant has been out of the territory of the United Kingdom and, indeed, of the European Union, for more than three months since he last entered the United Kingdom in 2008 and that the U.K. entry visa in his passport is not a "valid residence document" in the sense of Article 16 (3).

8. The second ground to be argued is that the transfer procedure in this case has failed to comply with the requirements of Article 20 of the Regulation. Article 20, para. 1 provides:

"An asylum seeker shall be taken back in accordance with Article 4 (5) and Article 16 (1) (c), (d) and (e) as follows:

(a) The request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible."

It is submitted that in this case the information given to the United Kingdom in the exchanges which took place omitted to mention the applicant's claim to have spent more than three months out of the United Kingdom since 2008.

9. The Court is satisfied that no fair issue to be tried is raised by any of these arguments.

10. In the first place, the fact that the applicant claims to have been out of the United Kingdom for more than three months is not relevant to the validity of the transfer order in this case because of the second paragraph of Article 16 (3) namely the exception to

the cessation of the take-back obligation where the third country national is in possession of a valid residence document issued by the Member State in question. Contrary to the submission made, the Court is satisfied that the visa issued to this applicant is a "valid residence document" for that purpose.

11. It is to be noted that the term "residence document" is defined in Article 2 (j) as meaning:

"Any authorisation issued by the authorities of a member state authorising a third country national to stay in its territory, including the documents substantiating the authorisation to remain in the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the responsible Member State as established in this regulation or during examination of an application for asylum or an application for a residence permit."

12. In other words, any document authorising a third country national to stay in the territory of a Member State is a "residence document" including those related to temporary presence for the particular purposes mentioned in the definition. Furthermore, the fact that the provision defines an exception for specific types of visas only, clearly demonstrates that other visas outside those types are not to be excepted from the scope of the term "residence document". Thus, an authorisation which is designated in a passport as a "visa" does not by reason of that designation alone, fall outside the definition of "residence document". It falls outside only where it is one of those identified in the exception clause of the definition.

13. In addition, it is to be noted that the term "visa" is defined so as to include the authorisation or decision of a member state required "for transit or entry for an intended stay" in the Member State. It covers both short stay visas for up to three months and long stay visas for periods in excess of that.

14. It is clear to the Court that the two year visa issued to this applicant in September, 2008 was an authorisation by the United Kingdom to the applicant to enter for an intended stay in the United Kingdom during that period. The U.K. Border Agency has clearly accepted that position by its agreement to take charge of the application on the explicit basis of Article 9.2. Subject to the argument mentioned in the next paragraph, it is not disputed that the visa is valid both in the sense that its 2 year period has not yet expired and that it is not a forgery.

15. In support of the argument reliance was placed on an expert statement supplied by the Chief Executive Officer of the Irish Refugee Council as a lawyer with expertise and experience in the rules and practice of the UK immigration authorities. She gives an exposition of the terms of the Immigration (Leave to Enter and Remain) Order 2000 to the effect that the visa is valid during the 2 year period for multiple visits to the UK for an aggregate period of visits of 6 months. Where, at a given date of entry, less than 6 months remain of the validity period of the visa, clearance would only be allowed for the remaining period up to the expiry date. Furthermore, she says that this only applies to entry as a visitor and that entry would be refused to the holder of such a visa whose circumstances had changed and who, for example, sought entry for the purposes of claiming asylum.

16. Without questioning the possible accuracy of this exposition of UK immigration controls and practice, the Court is satisfied that it has no bearing on the issue raised in respect of this transfer order. The issue is not whether the applicant has a current valid right or permit to reside in the UK. The issue is whether he is in possession of one of the documents which creates a connection between him and a particular Member State other than the one in which he has lodged the asylum application. A third country national entering the European Union is entitled under international law to claim asylum but under Union law he or she is not entitled to choose or dictate the Member State in which the claim will be examined. That is determined by the circumstances of entry into the Union and of the making of the application for asylum and in accordance with the criteria laid down in Chapter III of the Dublin II Regulation. Once a set of criteria is met and the requested Member State has accepted responsibility on that basis, the asylum seeker has no entitlement to compel the requesting State to dispute the validity of the acceptance. Where the applicable criteria are that of Article 9 it is the fact that a Member State has issued a residence document to the asylum seeker that places the responsibility for the application on the issuing Member State. Whether the Member State in question might be entitled in other circumstances to deny entry to the individual concerned or to cancel the document is irrelevant for this purpose. Once the document is valid and not a forgery, it is the fact of its issue to and possession by the asylum seeker which creates the connection and brings Article 9 into application.

17. The second argument as to the failure to inform the United Kingdom under Article 20 of the applicant's claim to have been outside the United Kingdom for more than three months does not, accordingly, have any material bearing upon the validity of the transfer order. There is, however, an additional reason why this argument is unfounded. The terms of the request defined in Article 20.1 (a) relating to the information to be given to the requested Member State applies only to cases where the asylum seeker is to be taken back under Article 4 (5) or paras. (c), (d) or (e) of Article 16.1. The only asylum application made by this applicant was made in this jurisdiction. He did not apply in the United Kingdom. This is not therefore a case which falls within any one of those categories. The responsibility to take charge in this instance arises under Article 9. Insofar as the request to the United Kingdom was concerned, therefore, the information relevant to enable the United Kingdom to check that it was responsible was that pertinent to the conditions of Article 9 namely the identity of the applicant as a native of Pakistan and as the same person to whom the two year visa for the United Kingdom had been issued in September, 2008.

18. Finally, there is one further consideration which the Court regards as significant in this case and which militates against the grant of interim relief in the absence of the respondents.

19. It is clear from the documentation lodged that far reaching issues of credibility arise as regards the account given by the applicant and in particular as to why someone with valid travel documents including current permission to enter the United Kingdom where he has relations and has previously resided, should travel illegally without documents on a route he is unable to describe in any detail instead of seeking to have his passport reissued and the visa renewed if, as he claims, they were destroyed. An applicant who comes to Court seeking interim relief in such circumstances owes a duty to the Court of full and candid disclosure of all relevant facts.

20. This applicant has sworn an affidavit but, it seems to the Court, has contrived to structure it in a way which significantly avoids making any direct statements of his own as to what actually happened to him between November, 2008 and his arrival here in January of this year. He does not himself make any averment as to the date upon which he actually left the United Kingdom nor as to how he entered the State. He appears deliberately, in the Court's view, to avoid stating whether he entered Ireland through the United Kingdom. Instead, the affidavit invites the Court to rely for evidence of these facts upon the contents of documents relating to the asylum process and the exchanges with the United Kingdom authorities.

21. There is, accordingly, a disturbing lack of candour in this application and where it not for the fact that the Court is satisfied that

no fair issue to be tried as to the validity of the transfer order has been made out, the Court would exercise its discretion to refuse to entertain the application for that reason.

22. The application for an interim injunction is accordingly refused.