**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2017 No. 1 JR]**

**BETWEEN**

**R.P.**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**AND**

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL**

**RESPONDENTS**

**JUDGMENT of Mr Justice David Keane on the 31st May 2019**

**Introduction**

1. The applicant moves to amend his statement of grounds in these judicial review proceedings. The respondents oppose that application.

2. The decision under review is that of the Refugee Appeals Tribunal, now the International Protection Appeals Tribunal ('the IPAT'), dated 14th December 2016 to refuse to accept the applicant's appeal against the decision of the Refugee Applications Commissioner ('the Commissioner') to transfer his refugee status application to another Member State, pursuant to the provisions of the European Union (Dublin System) Regulations 2014 ('the 2014 Regulations'), then in force, transposing 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 (recast) ('the Dublin III Regulation').

3. On 3 January 2017, Haughton J granted the applicant leave to apply for an order of *certiorari* quashing the IPAT decision on the grounds set out in his statement of grounds of that date.

4. On 31 December 2016, three days before the application for leave was made, the administration and business of the Refugee Appeals Tribunal in connection with, amongst other matters, the Dublin System Regulations were transferred to the International Protections Appeals Tribunal, under s. 71(1) of the International Protection Act 2015. I have amended the title of the proceedings to reflect that fact.

**Background**

5. The applicant is a male national of Pakistan, born in 1986, who presented himself to the immigration authorities in Dublin on 20 March 2015, having claimed to have arrived in the State from Liverpool via Belfast on that date.

6. The applicant was interviewed by an immigration officer in accordance with the requirements of s. 8 of the Refugee Act on 26 March 2015 and completed an asylum application ('ASY-1') form on that date. He completed the necessary questionnaire for the Office of the Refugee Applications Commissioner ('ORAC') on 6 April 2015.

7. An authorised officer of the Commissioner carried out a personal interview with the applicant on 25 September 2015, pursuant to Reg. 4 of the 2014 Regulations, transposing the requirements of Art. 5 of the Dublin III Regulation, presumably on the basis of his claim to have entered the United Kingdom on a student visa in 2010.

8. ORAC wrote to the applicant on 25 November 2015, as required by Reg. 5 of the 2014 Regulations, to inform him that the Commissioner had decided that the United Kingdom was the Member State responsible for dealing with his asylum claim under Art. 12(4) of the Dublin III Regulation for the following reasons:

> 'According to information received from the UK, you were, at the time of your application for asylum on 20/03/2015, in possession of a residence document which had expired less than two years previously. A request was made to the UK, based on the information available and in accordance with Article 12(4) of Regulation (EU) No. 604/2013, to take charge of your application for asylum. On 03/11/2015, the UK agreed to accept Ireland's request, in accordance with Article 12(4) of Regulation (EU) No. 604/2013.'

9. The letter went on to inform the applicant that he could appeal that decision to the Refugee Appeals Tribunal within 15 working days of the date of that notification, by completing an attached notice of appeal.

10. Nothing further occurred until, on 6 July 2016, the applicant's solicitors wrote to ORAC, enclosing his signed authority for them to act on his behalf, inquiring about when he could expect to receive a decision on the potential transfer of his asylum claim under the 2014 Regulations, and requesting a replacement for his identity card, which had expired.

11. ORAC replied on 8 July 2016, stating that a determination had been made on 25 November 2015, after which the applicant's file had been forwarded to the Irish Naturalisation and Immigration Service ('INIS') to whom ORAC had forwarded the solicitor's correspondence. INIS wrote to the applicant's solicitors on 14 July 2016 stating that the applicant had been requested to attend at the Garda National Immigration Bureau ('GNIB') on 12 January 2016 to facilitate arrangements for his transfer to the United Kingdom but had failed to do so, resulting in his classification as an absconder. The solicitors were requested to advise the applicant of his obligation to present at GNIB immediately.

12. The applicant's solicitors wrote to ORAC again on 22 August 2016, stating that the applicant had instructed them that he never received the notification of transfer decision and requesting that ORAC re-issue it and furnish them with a copy. ORAC furnished a copy under cover of a letter, dated 25 August 2016. INIS wrote to the applicant's solicitors on 29 August 2016, enclosing a copy of

their letter to the applicant of 6 January 2016, requesting him to attend at GNIB on 12 January 2016 to facilitate his transfer to the UK.

13. The applicant's solicitors wrote to ORAC and INIS separately on 9 September 2016, asking ORAC whether the notification of transfer had been sent by registered post and, if so, whether it had been returned, before informing INIS of their client's intention to appeal the transfer decision and requesting an undertaking that he would not be deported until the anticipated appeal had been determined.

14. ORAC wrote to the applicant's solicitors on 13 September 2016, confirming that the notification of transfer had been sent to the applicant by registered post at the address he had provided and had not been returned.

15. On 28 September 2016, the applicant's solicitors wrote to the Refugee Appeals Tribunal, enclosing a notice of appeal. The letter acknowledged that the appeal was late; explained that the applicant's instructions were that he had never received the notification of transfer decision; submitted that a late appeal should be accepted for that reason; and, finally, requested confirmation within 7 days of the date of that letter that the appeal would be accepted.

16. The Refugee Appeals Tribunal wrote to the applicant's solicitors on 29 September 2016, stating:

> 'In order for us to consider whether your client's appeal will be accepted, an affidavit must be submitted to this office by your client explaining why the appeal is late. It will be decided at this (sic) stage whether the late appeal can be accepted or not.'

17. The applicant's solicitors responded on 11 October 2016, enclosing an affidavit of the applicant in which he averred, in material part:

> 'I say I have not ever received a letter from [ORAC] dated 25th November 2015. I say I was living at the address that this letter was addressed to but I did not receive same and I beg to refer to the attach bar coded item delivery record print out showing that this letter was signed for by someone named Klaudia.
>
> I say I do not know of anybody by the name of Klaudia living at my address with me and I again confirm I never received the letter from ORAC dated 25th November 2015.'

18. The bar-coded item delivery record print out, exhibited by the applicant, also records that the letter was delivered at 9.24 a.m. on 26 November 2015. The applicant makes no comment on how it might have been possible for someone unknown to him to accept delivery of letter on his behalf at his address at that time on that date without his knowledge.

19. The Refugee Appeals Tribunal furnished its decision in a letter dated 14 December 2016. That letter states, in material part:

> 'Having reviewed the position. the tribunal is not in a position to accept this late appeal.
>
> The reasons are that: -
>
> 1. ORAC complied with Regulation 18(2)(b) of [the 2014 Regulations] in relation to the service of the transfer decision. A registered letter was sent to the correct address. This was then delivered and signed for at that address.
>
> 2. The tribunal is unaware of any other late appeal having been accepted in similar circumstances. This is considered to be a relevant consideration, given the comments of Butler J. at paragraph 6 of [*Duba v Refugee Appeals Tribunal & Ors* (Unreported, High Court, 22nd January, 2003)].

20. That is the decision under challenge in these proceedings.

21. Regulation 18(2) of the 2014 Regulations provides:

> 'Where a notice is required or authorised by these Regulations to be served on or given to a person, it shall be addressed to him or her and shall be served on or given to him or her in one of the following ways:
>
> (a) by delivering it to him or her, or
>
> (b) by sending it by prepaid registered post addressed to him or her at the address most recently furnished by him or her to the Commissioner….'

22. In *Duba* (at para. 6), Butler J found that the applicant had not been treated in accordance with the principle of equality in not being permitted to lodge a late appeal to the Refugee Appeals Tribunal against the Commissioner's recommendation that she not be granted a declaration of refugee status when a number of other applicants in closely similar circumstances (of error or failure on the part of the their legal advisors in circumstances beyond their control) had been permitted to do so. Butler J went on to find (at para. 8) that a late appeal, though not expressly permitted under the relevant statute, was not prohibited by it, and would accord with the requirements of natural and constitutional justice, particularly where it was necessary to avoid what, in that case, would otherwise have amounted to an exceptional injustice.

**Appeals against transfer decisions**

23. Article 27(2) of the Dublin III Regulation provides that an applicant shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal. Article 27(2) requires each Member State to provide for a reasonable period of time within which the person concerned may exercise his or her right to that effective remedy.

24. Transposing those requirements, Reg. 6(1) of the 2014 Regulations provides that an applicant may appeal to the Refugee Appeals Tribunal, in fact and in law, against a transfer decision. Regulation 6(2)(a) states that an appeal shall 'be made within 15 working days of the sending to the applicant of the notification under Regulation 5(2).

**Procedural history**

25. The applicant's statement of grounds is dated 3 January 2017. As it stands, it seeks a single substantive relief; an order of certiorari quashing the tribunal's decision not to entertain a late appeal against the decision to transfer his asylum claim to the UK. It does so on the following three grounds:

> 'a. It is in breach of natural justice and fair procedures and the European law principle of effectiveness for the [tribunal] to refuse to accept the applicant's appeal in the particular circumstances of this case.
>
> b. It was irrational and unfair for the [tribunal] to request affidavit evidence only to reject the appeal on a basis that rendered any affidavit evidence irrelevant.
>
> c. The refusal of the [tribunal] to consider the applicant's appeal was in breach of the applicant's legitimate expectations both in domestic and European law.'

26. The respondents filed a statement of opposition dated 24 March 2017, joining issue with the applicant on each of those three grounds, and pleading - with some apparent force - that the applicant has failed to properly particularise the first and third ones.

**New issues at the hearing of the application for judicial review**

27. At the hearing of the application before me, counsel for the applicant sought to raise two further grounds of challenge to the decision under review. The first concerned an asserted lack of clarity regarding the particular entity within the State (Commissioner, Tribunal or Minister) responsible for the exercise of State's entitlement under Article 17(1) of the Dublin III Regulation to decide to examine an application for asylum, even where it is not the State's responsibility under the criteria laid down in the Regulation ('the Art. 17 derogation entitlement'). The second concerned the assertion that the 2014 Regulations are *ultra vires* the European Communities Act 1972 by analogy with the decision of the England and Wales Court of Appeal in *R v Secretary of State for the Home Department and others, ex p Saleem* [2000] 4 All ER 814, which held that the imposition of a strict time limit for an asylum appeal, in conjunction with a deemed receipt of notice provision, in rules made under the UK Immigration Act 1971 was *ultra vires* that Act because, rather than regulating the right of appeal as envisaged, it was destructive of that right, which was a basic or fundamental one, akin to the right of access to courts of law.

28. While conscious of the dictum of Humphreys J in *B.W. v Refugee Appeals Tribunal & Ors.* [2015] IEHC 725 (Unreported, High Court, 17th November, 2015) that there is nothing in the rules or in logic to require an amendment to a statement of grounds to be sought by motion on notice, grounded on affidavit, I concluded that, in this case, justice and fairness required that a formal application should be made. That was because, in contrast to the position in *B.W.*, no clear or agreed formulation of the additional grounds that the applicant was seeking to raise could be identified at the hearing, although much time was spent in seeking to tease the arguments out.

29. Accordingly, I adjourned the hearing and gave the necessary directions on the application to amend.

**The amendment application**

30. On 18 May 2017, the applicant issued a motion for leave to amend his statement of grounds. As is evident from the terms of that motion, the applicant is no longer pursuing the first new issue that his counsel identified at the hearing.

31. The amendment sought involves the insertion of a claim for one additional relief, together with the necessary new grounds in support of that relief.

32. The additional relief sought is:

'A Declaration that Regulation 18(3) of [the 2014 Regulations] is *ultra vires* the powers conferred on the respondent by s. 3 of the European Communities Act 1972.'

33. The proposed new grounds in support of that relief are:

> '1. Pursuant to Reg. 18(2) of [the 2014 Regulations] one of the methods authorised for the service of a [notification decision upon an applicant] is by sending it by prepaid post 'addressed to him or her at the address most recently furnished by him or her to the Commissioner…..'
>
> 2. Regulation 18(3) of [the 2014 Regulations] stipulates that: 'Where a
>
> notice under these Regulations has been sent to a person in accordance with paragraph 18(2)(b), the notice is deemed to have been duly served on or given to the person on the third working day after the day on which it was so sent.
>
> 3. Accordingly, any such notice sent by registered post is deemed to have been received by an applicant three working days after it had been sent regardless of when or whether it was in fact received. An application to appeal to the International Protection Appeals Board (*sic*) in respect of the Transfer Decision must be made, under Regulation 6(2)(a) within 15 working days of the sending of the notification under Regulation 5(2)(a) – the Transfer Decision. There is no discretion to extend time. It appears therefore that the Tribunal refused to entertain the appeal simply on this account and the reasons provided are contained in a letter from the Tribunal to the applicant's solicitors, [dated 14 December 2016].
>
> 4. The rule contained in Regulation 18(3) is not expressly authorised in the European Communities Act 1972. The rule goes beyond regulating the right of appeal to the Tribunal in that it can deny the applicant (and has denied this applicant) his chance to appeal when, through [no] fault of an applicant there has been a failure to comply with the 15 day working rule. The rule is not reasonable or necessary to achieve any objective of timely and effective disposal of his intended appeal and has denied the applicant in this case, and is destructive of, his right to appeal. The rule is invalid insofar as it purports to determine conclusively the moment at which an applicant receives such notice for the purposes of invoking the 15 working days rule for applying to appeal.'

34. The application is grounded upon a short affidavit, sworn by the applicant's solicitor on 17 May 2017. That solicitor avers, without further elaboration or explanation, that 'the desire and need for such amendment only came to light in the recent past and that in those circumstances it would be just and equitable to allow [it]'. In argument on the motion, counsel for the applicant was a little less obtuse, stating simply that he had overlooked the point in January 2017 when preparing and presenting the application for leave.

**The principles**
35. The principles governing the determination of an application to amend a statement of grounds in judicial review proceedings have been authoritatively stated by the Supreme Court in *Keegan v Garda Síochána Ombudsman Commission* [2012] 2 IR 570 (*per* Fennelly J; O'Donnell and McKechnie JJ concurring). In short summary, I apprehend them to be as follows:

> (i) The object of the system of judicial review is to strike a fair balance between the certainty and security of administrative decisions and the rights of persons affected by them who wish to contest them (at 581).
>
> (ii) The court will be properly circumspect in permitting the amendment of a statement of grounds (at 577), but the paramount test is that of the interests of justice and the protection of the constitutional right of access to the courts (at 578).
>
> (iii) To obtain leave to apply for judicial review on an additional ground, the point as issue must be an arguable one (at 575).
>
> (iv) The failure to raise that ground in the original application for leave (or, certainly, within the time limited for seeking leave) must be justified or explained in accordance with the usual test for obtaining an extension of time in which to seek leave (ibid.).
>
> (v) An oversight or error by an applicant's lawyers might, depending on the facts, provide a sufficient explanation, but the court will be sceptical where new lawyers for the applicant have simply taken a different view of the law (at 583).
>
> (vi) The courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action or a challenge to a different decision (at 582).
>
> (vii) The nature of the decision under attack may also be relevant. If it is one that benefits the public at large or a large section of the public, a challenge may have corresponding disadvantages for a large number of people, which may explain why stricter rules have been introduced both in environmental and planning and in immigration and asylum cases. The court must have regard to the public policy rules that have prompted the adoption of such rules (*ibid*.)
>
> (viii) Amendment is more likely to be permitted where it does not involve a significant enlargement of the applicant's case. That is particularly so where the new ground is based on a pure matter of law. The converse is true where the new ground is likely to give rise to a further exchange of affidavits on questions of fact (*ibid*).
>
> (ix) The court must consider whether the amendment is likely to give rise to significant prejudice to the respondent.
>
> (x) A newly discovered fact is not a condition precedent to, still less the exclusive test for, the grant of leave to amend a statement of grounds (at 578 and 582).

**Argument**
36. The respondents present their arguments against permitting the amendment of the applicant's statement of grounds under four separate heads. The first deals with the application of the *Keegan* principles to the case at hand. The second addresses the extent to which those principles have been affected by the amendment to Order 84 of the Rules of the Superior Courts effected by the Rules of the Superior Courts (Judicial Review) 2011 (S.I. 691/2011). The third is directed towards the failure of the applicant to comply with certain directions that the court gave on 2 May 2017 on the timetable for the application to amend. And the fourth concerns the explanation that the applicant has given for not including the new relief he now seeks and the new ground on which he seeks it in an application for leave brought within the time permitted.

37. On the application of the decision in *Keegan*, the respondents emphasise the following points. First, in some cases, leave to amend has been refused where the applicant seeks to introduce what amounts to a claim for entirely new relief or a new cause of action. In *Keegan* (at 579 and 582), Fennelly J specifically instanced *Ní Eilí v Environmental Protection Agency* [1997] 2 I.L.R.M. 458. In that case, the applicant moved to amend her challenge to an integrated pollution control licence on existing reasonableness; irrelevant considerations; and fair procedures grounds, by the introduction of a challenge to the constitutionality of certain provisions of the Environmental Protection Agency Act 1992. Kelly J found, in the first instance, that s. 88(5) of that Act laid down an absolute time limit, which permitted no extension, but went on to hold that, as a matter of judicial discretion, he would have withheld leave to amend anyway in view of the fact that the proposed amendments would effectively give rise to a new cause of action.

38. In this instance, the applicant, who is challenging a tribunal decision on existing fair procedures; reasonableness; and legitimate expectation grounds, seeks to introduce a new ground of challenge to that decision - that it was *ultra vires* - and to pray for a new relief – namely, a declaration to that effect. However, it seems to me that the new ground speaks most directly to the single existing relief claimed, which is an order of certiorari quashing the tribunal's decision. It might be suggested that the new relief sought is, in that context, a limited, if not entirely superfluous, adjunct.

39. Second, in *Keegan* (at 584), Fennelly J identified a failure by the respondent to keep the applicant apprised of developments for some years in the process that led to the challenged decision as a significant counterbalance to the applicant's failure to raise the relevant ground within time. The respondents submit, correctly in my view, that there has been no counterbalancing failure or delay on their part in this case.

40. Third, in *Keegan*, citing *Muresan v Minister for Justice, Equality and Law Reform* [2004] 2 ILRM 364, Fennelly J observed (at 582) that the special and stricter statutory rules in immigration and asylum cases may derive from the nature of the decisions involved, as ones which benefit the public at large or a large section of the public, and that, in considering an extension of time, a court must have regard to the policy considerations which have prompted the adoption of such rules. There is an obvious public policy interest in expeditious decision-making concerning the Member State responsible for international protection applications under the Dublin III Regulation. That cannot be gainsaid.

41. Fourth, in *Keegan* (at 583), Fennelly J went no further than to say an oversight or error by an applicant's lawyers might (not *must*), depending on the facts, provide a sufficient explanation for delay. The facts here are very similar to those in *Keegan* in that regard; the reason for the failure of the lawyers in this case to raise within time the additional legal point they now wish to rely on raise can only be stated in the starkest terms – they entirely overlooked it.

42. The second head of the respondents' argument refers to the significance of the amendment of the relevant rules of court after the events that were the subject of the decision of the Supreme Court in *Keegan*. The Rules of the Superior Courts (Judicial Review) 2011 (S.I. 691/2011) introduced substantial amendments to Order 84 of the Rules of the Superior Courts ('RSC'). Whereas the old r. 21(1) provided for an extension of the period within which leave could be sought where the court was persuaded that there was 'good reason', the new r. 21(3) requires the court to be satisfied that there is good and sufficient reason and that the circumstances that resulted in the failure to make the application within time were either (i) outside the control of, or (ii) could not have reasonably been anticipated by, the applicant for such extension.

43. The respondents submit that, in conjunction with repeated judicial dicta in cases such as *Gilroy v Flynn* [2005] 1 ILRM 290 concerning the need for expedition in litigation, the court should closely scrutinise the explanation tendered on behalf of the applicant in this case with those principles in mind. While that does seem to me to be the correct approach, it should perhaps be borne in mind that the comments of Hardiman J in *Gilroy* (at 293-4) were directed towards the unfairness that delay can cause in cases involving witness testimony. It might also be thought that the failure by the applicant's legal adviser to advert to the legal point they now wish to raise was a circumstance outside the control of the applicant.

44. Under the third head of their argument, the respondents ask the court to note both the applicant's failure to comply with the court's timetable for the issue and service of his motion to amend and the late delivery of his written submissions in support of it. While the relevant periods of delay were not egregious, they can only be deprecated.

45. The respondent's fourth head of argument concerns the explanation – or, as the respondents would say, entirely inadequate explanation – given for the applicant's failure to include the new relief he now seeks and the new ground on which he seeks it in an application for leave brought within the time permitted. One cannot but be unimpressed by the explanation that the applicant's solicitor offered on affidavit for the delay involved, *i.e*. that 'the desire and need for such amendment only came to light in the recent past'. It is hard to imagine anything less enlightening. However, in his written and oral submissions, counsel for the applicant was more forthcoming, adopting the same simple and laconic explanation as that offered in *Keegan, i.e*. that the point was simply overlooked by the applicant's legal advisers. Certainly, this is not a case of new lawyers taking a new or different view of the law.

46. As a separate argument, the respondents point out that the proposed new ground of challenge to the tribunal's decision is inconsistent with the applicant's existing case. The applicant's existing grounds assert, in essence, that the tribunal failed to exercise its discretion to permit a late appeal against a transfer decision in a manner that was unfair, unreasonable or contrary to the applicant's legitimate expectation. The new ground that the applicant seeks to add relies, in significant part, on the assertion that the tribunal did not have a discretion to extend time. As against that, arguments in the alternative, depending on the view taken by the decision-maker of the facts or law, are not uncommon in litigation.

**Conclusion**

47. In this case, the balance between the protection of the integrity of the decision-making process and the applicant's right of access to the courts is delicately poised. While the arguability of the new ground he seeks to raise is not in issue, his explanation for his failure to raise it in time is just as stark as that proffered in *Keegan*; his legal representatives overlooked it. While a new relief is sought, in the guise of a declaration, the new ground sought to be raised directly subtends the existing relief at issue, an order of *certiorari* to quash the decision of the tribunal under challenge. There is a strong countervailing public policy interest in not acceding to the application because it is vital that the integrity of the immigration system, in general, and the Dublin System, in particular, should not be undermined. While the amendment sought would add a new and discrete limb to the applicant's argument, I am not sure that it would be fair to describe it as a significant enlargement of the applicant's case. It does appear to be based on a matter of pure law; whether Regulation 18(3) of the 2014 Regulations is *ultra vires* the powers conferred by s. 3 of the European Communities Act 1972. Beyond the public policy concerns already mentioned, this is not a case in which the respondents claim the amendment sought will give rise to significant prejudice.

48. Applying the paramount test of the interests of justice, I conclude – although without wishing to establish any precedent beyond the facts of this particular case and certainly not without some considerable hesitation – that I should permit the amendment sought. I will make an order accordingly.