

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**[2016] No. 424 J.R.**

**BETWEEN**

**D. S.**

**APPLICANT**

**AND**

**THE REFUGEE APPLICATIONS COMMISSIONER**

**RESPONDENT**

**JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 11th day of July, 2016**

**Introduction**

1. This is an ex parte application for leave to seek judicial review of the decision of the respondent that Austria is responsible, pursuant to the provisions of art. 18(1)(b) of Regulation (EU) No. 604/2013, for dealing with the applicant's application for international protection, as notified by letter of 4th May, 2016.

**Background**

2. By application dated 8th February, 2016, the applicant sought asylum from the Minister for Justice and Equality via the respondent. His fingerprints were taken and sent to the Eurodac database on the 9th of February 2016 which search revealed that the applicant had applied for asylum in Austria and Greece prior to his application in Ireland.

3. By letter of the 7th March, 2016, the applicant was invited to interview in respect of his application for asylum. The letter also informed him that if information became available indicating that another state may be responsible for his application, the interview would be conducted on that basis. An interview with the applicant was conducted on 30th March, 2016, in accordance with art. 5 of Regulation (EU) No. 604/2013 (the Dublin III Regulation).

4. Article 5 of Regulation (EU) No. 604/2013 provides:-

"In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4."

5. No complaint is made in these proceedings about the manner in which the art. 5 interview was conducted or about whether the information required to be supplied to the applicant under art. 4 was in fact supplied. In accordance with art. 4, a record of the interview was made and the applicant was invited to sign each page of the record of the interview. The applicant has exhibited a copy of the transcript of the interview and I shall refer to extracts from the interview.

6. The interviewer made some preliminary comments as follows:-

"You were fingerprinted when you applied for asylum in Ireland. Your fingerprints were sent to a central fingerprint database in Europe. This showed that you were fingerprinted in Greece on 08/08/2015 and in Austria on 20/08/2015".

The interviewer then said:-

"I am going to ask you some questions about your stay in both Greece and Austria and any other countries you may have visited since. This is not an interview to examine your asylum claim".

The interview then continued as follows:-

"2. Did you apply for asylum in Greece?

No.

Why not?

Because they advised us to leave the country.

3. How long did you stay in Greece after you were fingerprinted?

About 2-3 days.

4. When you left Greece, where did you go?

I went to Austria.

5. On what date did you arrive in Austria?

1-2 days before they fingerprinted me.

6. Did you claim asylum in Austria?

No.

Why not?

They took my fingerprints and they told me I could go. I didn't know the process there but I wanted to come to Ireland.

7. How long did you stay in Austria after you were fingerprinted?

About 4 days.

8. When you left Austria, where did you go?

I went to Iraq.

9. On what date did you arrive in Iraq?

08/09/2015.

10. Why did you return to Iraq?

Because I heard my mother was sick and she was nearly going to die. That is why I went back.

11. Do you have any evidence to show that you returned to your country of origin?

The applicant showed a copy of a document in Arabic which he states he returned to Iraq in Sept 14th, 2015. I explained that we would need to see the original as we will need to have it verified. I asked would he send it in and he said he would. I advised that we should get it within 7-10 days. I also advised that he should also include his name and reference number with it.

12. What document did you use to return to your country of origin?

I didn't use any documents I used an agent. I went back the same way I came.

13. What means of transport did you use to travel to Iraq?

The same agent who I had an arrangement with to take me to Ireland arrange the transport by sea and road."

7. Question 12 is of central importance to this application. I read the exchange between the applicant and interviewer as indicating that the applicant showed the interviewer an untranslated document and agreed to submit the original of it later. My understanding is that no document was submitted during the interview in connection with the matters being discussed at question 12 - i.e. whether the applicant could prove that he had returned to Iraq after his time in Austria.

#### **Making a take back request**

8. Article 21 of the Dublin III Regulation provides:-

"Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.

Notwithstanding the first subparagraph, in the case of a Eurodac hit with data recorded pursuant to Article 14 of Regulation (EU) No. 603/2013, the request shall be sent within two months of receiving that hit pursuant to Article 15(2) of that Regulation."

9. The court has been informed that the fingerprints were sent to the database on 9th February, 2016, but on the papers exhibited it is not possible to say when the "hit" was "received" and when the two month period expired.

10. My reading of art. 21 of the Dublin III Regulation is that Ireland may only request another Member State to be responsible for examining an asylum application where it "considers that another Member State is responsible for examining the application." It must make the request as quickly as possible and it must do so within two months of receiving the fingerprint hit on Eurodac. It is a matter for another day as to whether the word "considers" in art. 21 is used in the sense of "wonders whether" or "has decided" or "believes."

11. The applicant does not complain in these proceedings that the respondent was not entitled to make a take back request. As shall be seen, the complaint appears to be that the take back request addressed to Austria was based on errors and thus the decision to transfer him to Austria is tainted.

12. On 7th April, 2016, the respondent made a request to Austria to take back the applicant to assess his asylum application. Requests such as these are made on forms which are governed by, or must accord with, Annex III of Council Regulation (EU) No. 604/2013. Question number 13 on the form asks "Does the applicant state that he left the territory of the Member States?" The respondent answered this question "Yes." Question 14 on the form asks about "Documents submitted by the applicant" and this is replied to by the respondent with the words "none." In a further part of the form entitled "other useful information" the respondents stated:-

"...the applicant confirmed he was fingerprinted in Greece and Austria but [sic] stated he didn't claim asylum in Austria. Applicant stated after 4 days in Austria he returned to Iraq on 08/09/2015.

Applicant stated he left Iraq in December 2015, to Turkey by road, to Greece by sea and then to Ireland by air from an unknown country, arriving into Dublin Airport on 08/02/2016

...

There is no material evidence to suggest that the applicant has left the territory of the Member States since the date of his asylum application in the Austria. [sic]

We therefore kindly request, that you accept responsibility for the above named, in accordance with 18(1)(b) of Regulation (EU) No. 604/2013."

13. On 12th April, 2016, the applicant submitted documents seemingly in support of the proposition that having arrived in Austria and having been fingerprinted in that country, after four days he left the territory of the European Union and returned to Iraq. Medical reports and reports connected with involvement with the police were submitted seemingly in an attempt to prove that he was physically present in Iraq on dates after September 2015. This information was submitted to the respondent some five days after the respondent made the take back request to the Austrian authorities.

14. By letter dated 18th April, Austria accepted the transfer of the applicant for determination of his asylum application.

15. On 4th May the respondent wrote to the applicant saying that:-

"The Refugee Applications Commissioner has decided that Austria is responsible, pursuant to the provisions of Article 18(1)(b) of Regulation (EU) No. 604/2013, for dealing with your application for international protection."

16. A letter to similar effect was written to the Refugee Legal Service who, apparently, had submitted the documentation to the respondent on 12th April, 2012, which letter was acknowledged by the respondent on the same date. Accompanying the letter informing the applicant of the decision that he was to be transferred to Austria was a statement of reasons which said that the applicant had applied for asylum in Austria on the 20th August, 2015, (and in Greece on the 8th August, 2015). The letter also said that the Austrian authorities had agreed to accept Ireland's request.

#### **Article 19(2) of Council Regulation (EU) No. 604/2013**

17. Member States who are requested to take back an asylum applicant are relieved of that obligation where they can establish that the person concerned left the territory of the Member States for at least three months (see art. 19(2) of the Dublin III Regulation).

18. Article 2(a) of Commission Regulation (EC) No. 1560/2003, establishing rules for the application of Dublin III provides that:-

"Requests for taking back shall be made on a standard form in accordance with the model in Annex III, setting out the nature of the request, the reasons for it and the provisions of Regulation (EU) 604/2013 ... on which it is based.

The request shall also include, as applicable:

(a) a copy of all the proof and circumstantial evidence showing that the requested Member State is responsible for examining the application for international protection, accompanied, where appropriate, by comments on the circumstances in which it was obtained and the probative value attached to it by the requesting Member State ..."

#### **Core Issue**

19. The central complaint sought to be litigated by the applicant is that the respondent unlawfully completed the form making the take back request which was sent to the Austrian Authorities. In written submissions the applicant has expressed the complaint as follows:-

"The Respondent acted unlawfully and acted in breach of Article 23(4) of the Dublin III Regulation and in breach of Article 2(a) of the Commission Regulation (as inserted by Article 1(2) of the Commission Implementing Regulation) and Annex II and Annex III Annex III thereto by failing to reveal to the Austrian authorities on the form sent to them that documents had been submitted by the Applicant of potential relevance to the issue of cessation of obligations under Article 19(2) of the Dublin III Regulation, by failing to provide the Austrian authorities with a copy of the said documents, and by stating on the form that the Applicant had not provided any "material evidence to suggest that [he had] left the territory of the Member States since the date of his asylum application in . . . Austria." Moreover, the Respondent positively represented to the Austrian authorities that no documents had been submitted.

The Respondent has been given the jurisdiction to perform on behalf of Ireland "the functions of a requesting Member State": see Regulation 3(1)(b) of the European Union (Dublin System) Regulations 2014 (S.I. No. 525 of 2014). The Respondent had a duty under the EU law provisions referred to above to disclose to the Austrian authorities that the Applicant had submitted documents potentially relevant to Article 19(2) of the Dublin III Regulation and to provide to the Austrian authorities a copy of those documents. The Respondent's failure to comply with these duties was a serious error as to jurisdiction. It materially affected the decision sought to be challenged herein, because that decision was based solely or almost solely on the acceptance of the Austrian authorities of the take back request."

20. As to the second ground it seems indistinguishable from the first. It repeats the expression of the alleged error and adds a submission as to the consequence of the error and how it impacted on the decision under review.

21. In accordance with numerous decisions of the High Court including the decision in *P.D. v. Minister for Justice* [2015] I.E.H.C. 111 (Unreported, High Court, Mac Eochaidh J., 20 February 2015), it has been held that an applicant seeking to challenge the decision of the respondent must establish an error as to jurisdiction of sufficient weight to warrant intervention by way of judicial review, rather than pursuing the complaint about the decision by way of administrative appeal to the Refugee Appeals Tribunal. Thus, in order to be granted leave to challenge the transfer decision, the applicant must persuade the court to the standard of arguability that an error as to jurisdiction has infected the decision.

22. The alleged error as to jurisdiction pleaded is that the respondent failed to inform the Austrian authorities that the applicant had submitted documents. It is also said that the assertion by the respondent that there was no material evidence that the applicant had left the European Union was a significant error as to jurisdiction. These errors are said to be jurisdictional errors because the law requires Ireland to inform Austria about documents which have been submitted relevant to the Dublin III process and the law requires Ireland to indicate the existence of evidence relevant to the Dublin III process.

23. If the applicant had given documents to O.R.A.C. as part of the Dublin III process, failure to inform Austria about this fact on the Annex III take back request form would breach the rules connected with the process and would arguably constitute an error as to jurisdiction and thereby attract leave to seek judicial review.

24. On the date O.R.A.C. made the transfer request it had received no documents from the applicant. An untranslated document was "shown" by the applicant to the person conducting the art. 5 interview. That document and other documents were later submitted on the 12th of April, 2016. The statement on the Annex III form that no documents had been submitted by the applicant was correct on the date the form was signed – 7th April, 2016. O.R.A.C. did not breach any rule by saying on the Annex III form that the applicant had not submitted documents. This was not an error of any kind, much less an error as to jurisdiction which would warrant intervention prior to an administrative appeal.

25. I can readily see how the applicant might feel aggrieved that the Annex III form was sent to Austria, and the take back request was thereby made before he had a chance to submit documents which the interviewer expressly invited him to submit, and which were of central importance to the Dublin III process. Austria is, in principle, entitled to know what the applicant was telling the Irish authorities about how he could prove that he had returned to Iraq and remained out of the E.U. for more than 3 months. The applicant might well complain that the take back request should not have been made until he had submitted documents which the interviewer had given him "7-10 days" – which I presume means 10 days- to submit. (The form was sent to Austria before the 10 day period had expired. As indicated above at para. 8, take back requests must be made within two months when based on Eurodac hits and this is the likely explanation for sending the request on April 7th - just under two months from when the fingerprints were sent to the Eurodac database.) However, no complaint is made in these proceedings that the form was sent to Austria prematurely or that not waiting for the 10 day period given to the applicant to submit documents to expire before making the take back request was a breach of his due process rights.

26. As to the second alleged jurisdictional error - the assertion on the Annex III form that no material evidence had been produced by the applicant as to departure from the European Union - this was an expression of a decision of an evaluative matter. It is not an error as to jurisdiction. The respondent was not of the view that the applicant had produced material evidence to prove that he had returned to Iraq on the date the form was signed. The assessment of the evidence as to this fact is exclusively a matter for the respondent. If it was in error to say that there was an absence of material evidence to support the idea that the applicant had left the European Union, this was an error within jurisdiction, an error of an evaluative kind or an error of judgment, but not an error as to jurisdiction.

27. I cannot detect an arguable case as to illegality on the basis argued. The complaints about the content of the take back request that was sent to Austria not reflecting the information provided by the applicant to O.R.A.C. may be pursued by way of appeal to the Refugee Appeals Tribunal.

28. This application for leave to seek judicial review is refused.