Neutral Citation Number: [2011] IEHC 60

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 922 J.R.]

BETWEEN

AMIN WADRIA

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 25th day of February 2011

1. By order of the Court (Cooke J.) of the 13th January, 2010, the applicant was granted leave to apply for judicial review of a decision dated the 26th August, 2009, made by the respondent which recommended reaffirmation of a transfer order made in respect of the applicant on the 19th October, 2005, requiring the transfer of the applicant to the United Kingdom under Council Regulation (EC) No. 343/2003 of 18 February 2003, (the "Dublin II Regulation"). The applicant had made a prior application for asylum in the United Kingdom before arriving in the State and making an application here.

2. More particularly, the reliefs in respect of which leave was granted included:

- An order of *certiorari* quashing a notice of the 26th August, 2009, requiring the applicant's transfer to the United Kingdom and terminating the applicant's permission to remain in the State;

- A declaration that the transfer order of the 19th October, 2009, was null and void;

- Alternatively, an order quashing the transfer order of the 19th October, 2009;

- A declaration that the removal of the applicant to the United Kingdom would infringe the duties of the respondent under the Constitution and Articles 3 and 8 of the European Convention on Human Rights;

- Further and other relief and an order for costs.

3. The grounds upon which that leave for the review was granted were as follows:-

1. The transfer order of the 19th October, 2005, is void and no longer capable of lawful implementation on the ground that, since the expiry of the period of six months following the acceptance by the United Kingdom of the respondent's transfer request (or the later decision on appeal against the transfer order) the transfer has lapsed by virtue of Article 20.1(d) of the Dublin II Regulation and responsibility for the examination of the applicant's asylum application has lain with the respondent:

2. The said decision of the 28th August, 2009, is unlawful in that, if the said transfer order remained valid and enforceable as of the 10th July, 2009, the respondent by his agreement of the 13th July, 2009, undertook to reconsider its implementation in the light of the fresh representations and medical evidence as to the effect of the transfer upon the applicant's mental and physical condition and on his rights under Articles 3 and 8 of the European Convention of Human Rights and has failed to so in a manner which was adequate, proportionate and lawful.

4. The background to the proceeding can be summarised as follows. The applicant is a national of Algeria who came to the State and applied for a declaration of refugee status in August 2005. He claims that in Algeria he had been detained and tortured, a claim which is said to be supported by medical evidence. Upon arrival in the State and when claiming asylum, the applicant failed to disclose that he had already applied for refugee status in the United Kingdom where his application had been refused. The search initiated by the Office of the Refugee Applications Commissioner identified that earlier application and it was recommended that the United Kingdom be requested to take the applicant back under Article 16(1) (c) of the Dublin II Regulation. On the 21st September, 2005, the United Kingdom authorities agreed to accept the return by way of transfer of the applicant. By letter of the 11th October, 2005, the applicant was given notice of the intention to transfer him to the United Kingdom on that basis.

5. The applicant appealed this determination to the Refugee Appeals Tribunal, but by letter of the 25th October, 2005, he was served with the transfer order dated the 19th October, 2005 made under Article 7 of the Refugee Act 1996 (Section 22) Order 2003. (S.I. No. 423 of 2003.)

6. Judicial review proceedings were commenced (2005 No. 1278 J.R.) in which an unsuccessful application was made for an interim injunction to restrain implementation of that transfer. Nevertheless, following service of the proceedings, on the 2nd December, 2005, the respondent undertook not to implement the transfer prior to the 16th January, 2006. On the 16th January, 2006, the matter was listed before the High Court (Finlay Geoghegan J.) and an order was made by consent granting leave to seek judicial review in the terms sought together with a timetable for service of opposition papers and an order restraining the transfer of the applicant to the United Kingdom pending the outcome of the proceedings.

7. Thereafter, the pleadings were closed between the parties and when the matter was before the Court (Finlay Geoghegan J.) on the 6th February, 2006, it is said that the respondent was offered an opportunity to have the proceedings heard on an expedited basis as urgent because the six month time limit for the effecting of a transfer order under the Dublin II Regulation was running. It is

also claimed, however, that counsel for the respondent indicated that the proceedings should await the outcome of a Supreme Court appeal in a case which was pending and that Finlay Geoghegan J. indicated that this might have the consequence that the transfer order could not be executed if time ran against it. Thereafter, the judicial review proceedings in question were repeatedly adjourned on the application of the respondent until finally fixed for hearing on the 10th July, 2009 when overtures for a compromise were apparently made.

8. As a result, the matter was compromised and the proceedings were struck out by consent upon agreed terms set out in a letter of 13th July, 2009 by the Chief State Solicitor to the applicant's solicitor including the following:

> *"1. The Minister will consider fresh representations on behalf of the Applicant as to why he should not execute the transfer order, such representations to include an updated medical report to be forwarded to the Minister by 31st July 2009… 2. The Respondent consents to an injunction restraining the transfer of the Applicant for a period of 21 days and for such period thereafter as may expire until receipt of notice of the Minister's determination…"*

9. On foot of those terms, a letter of the 31st July, 2009, was written by the applicant's solicitors enclosing an "updated medical report" dated the 28th January, 2009, from the Centre for Care of Survivors of Torture (SPIRASI) which expressed the opinion that the applicant required specialised care and rehabilitation in a secure environment and that "any change or transfer at this stage may severely affect his full psychological and emotional recovery which he has struggled to achieve in three years here in Ireland". No further narrative submissions were made but the solicitors asked that "all prior submissions made in support of our client's case be considered by the Minister in terms of this application …"

10. By letter of the 26th August, 2009, the respondent gave notice that the applicant's entitlement to remain in the State had expired and that the transfer order of the 11th October, 2005, would be implemented and that he would be therefore removed to the United Kingdom on or before the 30th September, 2009. Attached to that letter was a memorandum compiled within the Repatriation Unit of the respondent's Department setting out the consideration of the transfer application, including the representations that had been made on the applicant's behalf and the updated medical report dated the 28th January, 2009.

11. Solicitors for the applicant thereafter asked the respondent to undertake not to effect the transfer for 21 days, but this was refused. The present judicial review proceeding was then commenced on the 7th September, 2009.

FIRST GROUND

12. It is in these circumstances that the first ground for which leave was granted raises the specific legal issue as to whether by reason, in effect, of what occurred in Court on the 16th January and 6th February 2006, the period of six months following the acceptance by the United Kingdom of the transfer request had expired by the time it was decided, on the 28th August, 2009, to implement the transfer. This issue turns upon the construction and effect which falls to be given to Article 20.1 of the Dublin II Regulation and particularly sub paragraphs (d) and (e) which read as follows:-

> "1. An asylum seeker should be taken back in accordance with Article 4(5) and Article 16(1) (c), (d), and (e) as follows: ……
>
> (d) A Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is suspensive affect."
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> (e) "The requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. The decision shall set out the grounds on which it is based. It shall contain details of the time limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this".

13. The crucial question which therefore falls to be decided in this case on this issue is whether the order made by Finlay Geoghegan J. of the 16th January, 2006, had an effect which comes within terms of the last sentence of para. (e) above, namely, that of constituting a decision by that Court in this particular case that implementation of this transfer should be suspended.

14. Article 20.1(e) of the Dublin II Regulation deals with the procedure to be followed where an asylum seeker is to be transferred from a requesting State to the State which has accepted responsibility for the asylum application. As indicated in the passage cited above, the paragraph provides that the decision to transfer is to be notified to the asylum seeker setting out the grounds on which it is based with detailed information as to the date and place for the transfer. The paragraph then provides that the decision may be subject to an appeal or a review. An appeal or review does not however have the effect of postponing or suspending implementation of the transfer except when a Court or competent body so decides on a case by case basis where national legislation has provided for that possibility.

15. It is argued on behalf of the applicant that although the respondent was restrained from giving effect to the transfer to the United Kingdom from the 16th January, 2006, this was not the result of a specific Court decision of the kind contemplated by that paragraph. This is because, it is said, the order was not "decided" upon by the Court but was made by consent.

16. In the judgment of this Court, this argument is unfounded. The order of the 16th January, 2009, provides at paragraph 2 of its operative part: "Ordered … that the respondent, his servants or agents, be restrained pending the determination of the proceedings herein from taking any steps to transfer the applicant to the United Kingdom pursuant to the transfer order dated the 19th October, 2005."

17. The fact that this order was made by consent has no bearing upon the legal character or effect of the order made by the Court. Any removal of the applicant to the United Kingdom so long as that order was not vacated, would have constituted a breach of the order and a contempt of court. In that regard para. 2 of the order has precisely the same force and effect as it would have had if contained in an order made after a fully contested hearing and on foot of a reasoned judgment in the applicant's favour. By consenting to an injunction a respondent places himself in the same position *vis a vis* the Court and the opposing party as when offering an undertaking to the Court and the undertaking has the same effect in law as an order granting an injunction (*Biba Ltd v.*

Stratford Investments Ltd [1973] 1 Ch. 281 at 287). An undertaking given to the Court and an injunction consented to cannot be altered or ended by withdrawal of consent. The party concerned can only change or end the restraint by application to the Court to have the terms varied or the order vacated. (*Cutler v. Wandsworth Stadium Ltd* [1945] 1 All E.R. 103 and *Wilding v. Sanderson* [1897] 2 Ch. 534.)

18. Contrary to the interpretation suggested, the Court did "decide" to restrain the transfer in that the judge considered it proper to accept the terms which the parties had agreed and to give them the force of a rule of Court. It was not obliged to do so. A Court is not bound to make an order in terms dictated to it by the parties to the proceeding even when it is by consent and that is particularly so in circumstances where the order proposed has a bearing upon relations with third parties (in this case, another Member State,) and may involve postponement of implementation of an agreement apparently reached with that State under a reciprocal legislative arrangement such as that contained in the Dublin II Regulation.

19. In the judgment of this Court, Finlay Geoghegan J., having been told that the United Kingdom had accepted responsibility for the applicant's asylum proceeding, could have required any issue in relation to the implementation of the transfer to be determined forthwith with a view to effect being given to the provisions of the Dublin II Regulation without delay. Indeed, it appears from what is described as having happened in Court on the 6th February, 2006 when the offer of an early hearing of the substantive application was made, that the learned High Court judge was alive to considerations of this nature. While the learned judge may have assumed that time would run against implementation of the transfer order, it seems clear from the descriptions of the exchanges in court, that the offer of an expedited hearing was made without being based upon any considered decision taken as to the actual meaning and effect of Article 20.1(e) in the particular circumstances. (The applicant expressly accepts that on 16th January 2006 no papers were handed into court and that the facts of the case were not considered or examined and the position on 6 February 2006 does not appear to have been any different in that regard.) Whether or not the consent injunction had suspensive effect, therefore, depends not on any assumption made at the time but on the construction to be given to that article in the light of the legal effect of such an order in national law.

20. In the judgment of this Court, therefore, the fact that the order restraining the transfer was made by consent does not take it outside the suspensive effect envisaged by Article 20.1(e) of the Regulation.

21. This approach is not, in the view of this Court, inconsistent with the objectives and policy of the Dublin II Regulation as illustrated, for example, by the judgment of the Court of Justice of the European Union in case C-19/08 *Migrationsverket v. Petrosian and Others* [2009] E.C.R. 1-495. The purpose of including the six month period in Article 20.1 (e) is not to allow for the conduct of appeal proceedings in the requesting State against the transfer order, but to allow the requesting State sufficient time to make the practical arrangements for implementation of the transfer. Thus "the period for carrying out the transfer may begin to run only as from the time the future implementation of the transfer, is, in principle, agreed upon and certain and only the practical details remain to be determined. Such implementation cannot be regarded as being certain, however, if a court of the requesting Member State which is hearing an appeal has not yet ruled on the merits of the appeal but has merely ruled on an application for suspension of the operation of the contested decision". (para. 45 of that judgment.)

22. This approach is not affected either, in the view of the Court, by the fact that the suspension which occurred here was brought about by a consent order in the judicial review proceeding in the High Court rather than by a suspension introduced pending the outcome of the appeal of the determination of the Commissioner before the Refugee Appeals Tribunal. The above judgment emphasises the autonomy of the individual Member States in matters of procedure for appeals and reviews and in the provision of judicial remedies. Paragraph 48 of the judgment the court said:

> ". . . it is clear that the Community legislature did not intend that the judicial protection guaranteed by the Member States whose courts may suspend the implementation of a transfer decision, thus enabling asylum seekers duly to challenge decisions taken in respect of them, should be sacrificed to the requirement of expedition in processing asylum applications.
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> 49. Those Member States which wish to introduce appeal remedies liable to lead to decisions having suspensive effect in the context of transfer procedures may not, for the sake of meeting the requirement of expedition be placed in a less favourable situation than those Member States which did not deem it necessary to do so."

23. It was also suggested in argument that the legal character of the consent order may be affected by the fact that it would not have been possible on the 16th January, 2009, for the applicant to have applied for an interlocutory injunction because an interim injunction had already been refused by the Court on the 28th November, 2005. This suggestion does not alter the Court's assessment of the effect of the consent order described above. The refusal of an interim injunction is no bar to an application for an interlocutory one. An *ex parte* application may be refused for a variety of reasons, (-lack of urgency, for example,) which would not be relevant to the interlocutory application. Contrary to the suggestion made, the principle of *res judicata* does not apply in those circumstances. On an *ex parte* application for an interim injunction, the Court is primarily concerned with the apparent urgency of a need to preserve an existing status quo in the face of some risk of irreversible change of circumstances in an emergency. The issues before the Court in applying the criteria of the *Campus Oil* case on the interlocutory application will usually be materially different.

SECOND GROUND

24. As indicated in para. 3 above, this second ground is directed at the terms upon which the respondent undertook to reconsider implementation of the transfer order following the compromise reached on the 13th July, 2009. The applicant claims that the respondent has failed to do so in a manner which was adequate, proportionate and lawful. In the statement of opposition the respondent pleads by way of preliminary issue that he was "under no obligation in law to consider any representations seeking humanitarian relief or suspension of the transfer order". He has also denied that the decision of the 28th August, 2009, confirming the transfer order failed to "reconsider its implementation in a manner which was adequate proportionate and lawful".

25. There is no doubt, of course, that the Minister did agree in the compromise to "consider fresh representations as to why he should not execute the transfer order". It is also clear that this was in fact done. The consideration was set out in a memorandum dated the 26th August, 2009, signed by two officers of the Repatriation Unit (Mr. McCormack) and the Dublin II Transfer Unit (Mr. Megraw). This memorandum refers to the original submissions made by the Refugee Legal Service in relation to the risk of *refoulement* if the applicant was transferred to the United Kingdom for repatriation to Algeria. It then considers the updated medical report sent in on the 31st July, 2009, and summarises its contents. It notes "the report describes Mr. Wadria as having made considerable progress and given the United Kingdom's advanced medical, welfare and social protection systems, the authorities there will be quite capable of providing appropriately for his medical treatment, care and protection which would offset the temporary setback to his progress that could ensue from the act of transferring him". The officers then recommend that the transfer order of the 19th October, 2005, be affirmed.

26. In as much as the "fresh representations" consist of the medical report dated the 28th January, 2009, it is clear that the representations were read and considered. The applicant's argument, however, amounts to a complaint that this response to the medical report is in some way inadequate to the extent of being unlawful. This, it seems to the Court, amounts to an assertion that independently of the contractual obligation undertaken by the terms of the compromise on the 13th July, 2009, the Minister had in these circumstances an obligation in law to reconsider giving effect to the transfer order as if the Minister was making a new decision at that stage on the merits. It is argued the essential basis of the recommendation quoted above is irrational in asserting that the availability of health services in the United Kingdom would "offset the temporary setback" arising from the transfer. This is said to fly in the face of the expert medical opinion given in the report. It is said that the decision to reaffirm the transfer order is therefore unlawful because the Minister fails to discharge his duty in compliance with s. 3 of the European Convention on Human Rights Act 2003, by performing his function in a manner compatible with obligations arising under the Convention including the obligation under Article 3. In effect, it is argued that the Minister by reaffirming the transfer exposes the applicant to torture or inhuman or degrading treatment.

27. It is relevant therefore to consider the precise nature and scope of the Minister's function when giving effect to what had been agreed on the 13th July, 2009.

28. The case which had been referred to before Finlay Geoghegan J. as the reason for adjourning the judicial review proceedings in February 2006, was her own judgment of the 15th November, 2005, in *Makumbi v. Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 403. The issue under consideration in that case concerned the entitlement of the Minister to exercise a discretion not to implement a transfer order made under Article 7(1) of the Refugee Act 1996, (s. 22) Order 2003. In that case the applicant had applied for asylum in the State having previously made an application in the United Kingdom and the latter Member State had agreed to take the applicant back in accordance with Article 16.1 of the Dublin II Regulation. It was sought to resist implementation of the transfer order upon medical grounds. It was said that there was a real and substantial risk of suicide on the part of the applicant if the order was implemented. The issue before the Court was whether the Minister had an obligation to consider that medical evidence. The Minister denied that there was any such obligation upon the basis that he had no discretion or power not to implement the order.

29. Finlay Geoghegan J. concluded that the Minister did retain a discretion in that regard. This was upon the basis that while Article 20.1(d) of the Regulation created an obligation for the United Kingdom to readmit the applicant to its territory, it did not correspondingly impose a specific obligation upon the State to transfer the applicant. He had a right to do so but Article 20.1 recognised that in certain conditions the State might fail to exercise that right within the six months time limit and thereupon become automatically responsible for the further processing of the applicant's asylum application thereby losing its entitlement to transfer her to the United Kingdom.

30. In that judgment Finlay Geoghegan J. emphasised particularly that she was "considering the existence of such a discretion in the factual circumstances which pertain to this application". These included particularly the fact that since the making of the transfer order medical information had become available and events had occurred which indicated a real and substantial risk of suicide, therefore risk to the life of the applicant by the fact of implementation of the order. The learned High Court judge also recognised, however, that by necessary implication the construction of the 2003 Order for the purpose of giving effect to the Regulation created both the power and a duty on the respondent to implement the transfer order.

31. There is one aspect of the present case which is materially different from the circumstance considered by the Finlay Geoghegan J. in the *Makumbi* case. In that case the applicant had made an application for asylum in the United Kingdom but that application had not yet been determined. Here, the United Kingdom application has already been determined and refugee status has been refused. It is therefore, at the very least, highly questionable whether the failure to implement the transfer order within the six months period could have the result sought to be achieved by the applicant namely, the "further examination of the asylum application" with a view of avoiding repatriation to Algeria. Article 3 of the Regulation provides "Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chap. III indicate is responsible". The terms "applicant" and "asylum seeker" are defined in Article 2(d) of the Regulation as meaning "a third country national who has made an application for asylum in respect of which a final decision has not yet been taken".

32. In these circumstances the "take back" obligation which arises for the United Kingdom under Article 16.1 is that of para. (e) namely to "take back under the conditions laid down in Article 20, a third country national whose application it has rejected and who is in the territory of another Member State without permission". It is to be noted that the expression used is "third country national" and not "applicant" as in the preceding subparagraphs. It was in fact by reference to that paragraph (e) that the United Kingdom agreed to take back the applicant in this case. The request to take back had been made by reference to Article 16.1 (c) but when the United Kingdom authority replied on 21 September 2005 it based its acceptance explicitly on paragraph (e).

33. It would, accordingly, be incompatible with the scheme and objective of the Regulation and particularly the requirement that there be a single application for asylum and a single examination of it within the territory of the Union that an existing determination be ignored and a new examination be undertaken of a second application. Where an applicant moves from one Member State to another before the examination is completed, responsibility for the examination may shift in accordance with the criteria for responsibility set out in Chapter III. Where the asylum examination has been completed, however, it would be incompatible with that objective that a second Member State could be compelled to exercise a discretion to assume responsibility with a view to arriving at a different determination of the asylum application.

34. It is, accordingly, in the judgment of the Court, strongly arguable that the discretion retained by the Minister in the particular circumstances of *Makumbi* case does not exist in circumstances where the examination of the asylum application has already been determined in another Member State. The Court uses the expressions "highly questionable" and "strongly arguable" above because it is unnecessary to reach a definitive conclusion on that point for the purposes of this judgment, the Court being in any event satisfied that even if the Minister can be said to retain a discretion in these circumstances, he has in fact done what he agreed to do in the terms of 13th July, 2009, and has not failed to do so in a manner which was either inadequate or unlawful.

35. It is important, of course, to distinguish between the decision to execute the transfer of the applicant to the United Kingdom and the distinct issue as to the repatriation of the applicant to Algeria. The Minister was not in any sense concerned with the issue of *refoulement*. His only concern was to consider, as he had agreed, the fresh representations made in respect the implication of transferring the applicant to the United Kingdom in the light of the medical information. The Minister had already indicated to the applicant and the applicant's legal representatives, that before the transfer was implemented the United Kingdom authorities would be fully alerted to the applicant's condition and the medical issues. It could not, in the Court's judgment, be considered in any sense unreasonable for the Minister to have concluded that there was no obstacle to such a transfer based upon the medical information. Having regard to the fact that it is not at all unusual for very gravely ill patients to be transferred from this country to hospitals in the

United Kingdom for specialist and life saving treatment, the conclusion that the act of transfer would not in itself amount to inhuman or degrading treatment, could not be said to be irrational or unreasonable. The essential effect of the opinion expressed in the report of the 28th January, 2009, was that the applicant had a history of severe physical and psychological abuse; that his treatment had been slow due to the complexity of the severe trauma, but that he had made considerable progress "with huge effort and support of a specialised team" and was in need of long term rehabilitation, and of therapeutic care of a specialised nature. He was said to be "a very educated individual with an academic background of teaching and part of his recovery can be attributed to his pursuit of reading and writing to keep himself safely occupied while his life has been put on hold here in Ireland". The conclusion was that the applicant "requires specialised care and rehabilitation in a secure environment where he can safely continue the recovery which is only in the early stages. Any change or transfer at this stage may severely affect his full psychological and emotional recovery which he has struggled to achieve in the three years here in Ireland".

36. In the judgment of the Court this medical opinion could not be said to amount to a compelling assertion that the transfer of the applicant to the United Kingdom would of itself amount to such a severe disruption of his current therapy as to involve an infringement of his right to life or his protection from inhuman or degrading treatment. It could not, accordingly, be said that the Minister fails to discharge his function in accordance with s. 3 of the 2003 Act, by reaffirming the transfer, and implementing it having first fully informed the United Kingdom authorities of the applicant's condition and of the medical opinion as to his continuing need for treatment.

37. For all of these reasons, the Court considers that the Minister has both done what he agreed to do on the 13th July, 2009, and has acted lawfully in exercising such function as required to be discharged under Article 20.1 of the Regulation in a manner compatible with his duty under s. 3 of the Act of 2003.

38. As neither ground for which leave was granted has been sustained, the application for judicial review must be refused.