Neutral Citation Number: [2012] IEHC 9

THE HIGH COURT

JUDICIAL REVIEW

2012 10 JR

BETWEEN

ROSEMARY AKUKWE

APPLICANT

AND

THE REFUGEE APPLICATIONS COMMISSIONER AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 17th day of January 2012

1. The applicant seeks an interlocutory injunction to restrain a transfer order made under Council Regulation (EC) 343/2003 of 18 February 2003 (the "Dublin II Regulation") on 12 December 2011 for the transfer of the applicant to the United Kingdom. In these circumstances, obviously, the *Campus Oil* test applies in which the first limb is the question as to whether a fair issue is raised for hearing at the application for leave to apply for *certiorari* by way of judicial review to quash the order. The issue which is claimed to be raised for this purpose is one which goes to the alleged illegality of the transfer order upon the ground that the acceptance of the "take-back request" by the United Kingdom was outside the time limits said to be prescribed by the relevant provisions.

2. That issue turns on the construction of the provisions for the timing of the transfer procedures under the Dublin II Regulation as contained in Article 20 (1) (b) of the Dublin Regulation II and in Article 5. 2 of the Commission Regulation (EC) 1560/2003 of 2 September 2003 ("the Commission Regulation") and particularly the final sentence of the latter paragraph.

3. The issue arises in the following circumstances. The applicant came to the attention of the Irish Naturalisation and Immigration Service in Bandon in Co. Cork in September, 2011 and was detained as it was clear she was illegally present in the State. She then made an application for asylum which is now admitted to have been made on a false basis, in that she claimed to have arrived in the State directly from Nigeria in 2009. A Eurodac search was made and it revealed that she had in fact made an asylum application in the United Kingdom in 2003, which had been refused. She later claimed to have lived in London following that refusal from 2003 until 2009 when she entered the State illegally and then worked illegally as hairdresser.

4. A request to take charge of the applicant was made to the United Kingdom on the 11th October, 2011, based upon the information in the Eurodac hit and the United Kingdom replied on the 19th October, 2011, effectively seeking further information, but stating in the meantime that the request to take back was denied. The communication from the UK Border Agency said:

> "According to UK Immigration records the above named was last known to UK authorities in June 2007. In order for the UK to consider whether it remains responsible for the subject under the Dublin regulation I would be grateful for details of the subject's stated whereabouts between June 2007 and her arrival in Ireland. Pending the above information, your request is respectfully denied."

5. The response from the United Kingdom was, therefore, both a request for further evidence or information in order to establish the responsibility of the United Kingdom for the asylum application and a denial of that responsibility. It was clearly formulated in those terms in the light of the two week time limit for a reply mentioned below but in the knowledge that further information or evidence might well be provided before responsibility was finally determined.

6. On the 7th November, 2011, the Office of the Refugee Applications Commissioner made a request under Article 5.2 to the United Kingdom to re-examine that reply and two days later on the 9th November, 2011, the United Kingdom Border Agency formally accepted the take back request.

7. The relevant provisions governing this issue are as follows. Article 16(1)(e) of the Dublin II Regulation provides that the Member State responsible for examining an application for asylum under the Regulation is obliged 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. Article 20 (1) (b) then provides that the asylum seeker is to taken back in accordance with Article 16 (1) (e) according to arrangements as follows:

> "the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks".

8. The further provision which is relevant to this issue is that contained in the Commission Regulation which lays down the detailed rules for the application of the Dublin II Regulation and particularly Article 5 which deals with the circumstances which arise when a negative reply is given under Article 20 of the Dublin II Regulation. Article 5 provides in para. 1: "Where, after checks are carried out, the requested Member State considers that the evidence submitted does not establish its responsibility, the negative reply it sends to the requesting Member State shall state full and detailed reasons for its refusal". Paragraph 2 then provides: "Where the requesting Member State feels that such a refusal is based on a misappraisal, or where it has additional evidence to put forward, it may ask for its request to be re-examined. This option must be exercised within three weeks following receipt of the negative reply. The requested Member State shall endeavour to reply within two weeks. In any event, this additional procedure shall not extend the time limits laid down in, (so far as relevant to the present case,) … Article 20,1(b) of the [Dublin II] Regulation."

9. Thus the fair issue asserted as arising in the present case is to the effect that this "additional procedure" of Article 5 for re-examination of a take back request "cannot extend" the two week period for acceptance fixed in Article 20 (1) (b) of the Dublin II Regulation, so that the United Kingdom's acceptance on the 9th November 2011, was invalid because it came after the expiry of two weeks from the original request made on the 11th October, that is, after the 25th October, 2011.

10. The Court is satisfied that this argument is unfounded and does not raise a fair issue for the purpose of the first limb of the *Campus Oil* test.

11. It is important to bear in mind when considering the terms of the European Union legislation of this kind that it is not only the wording of the provision that must be considered, but the context and objective or purpose of the provision. As the Court of Justice of the European Union has frequently pointed out: "… according to settled case law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objective pursued by the rules of which it is part." (See for example Case 292/82 *Merck v Hauptzollamt Hamburg-Jonas* [1983] ECR 3781 at par 12 or Case C-19/08 *Migrationsverket v Petrosian & Ors* [2008] ECR I-000 at par. 34.)

12. It should also be recalled that the Court of Justice has also repeatedly held as regards possible linguistic divergences, "firstly, that the need for a uniform interpretation of Community law means that a particular provision should not be considered in isolation but in cases of doubt should be interpreted and applied in the light of the other language versions and, secondly, that the different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (See to this effect for example Case C-372/88 *Cricket St. Thomas* [1990] ECR I-1345, par 19 or Case C-300/05 *ZVK* [2006] ECR I-11169, par16.)

13. The fallacy in the argument advanced in this case, is to ignore the relationship between the Dublin II Regulation and the Commission Regulation setting out the detailed rules for its implementation and to concentrate exclusively on what appears to be the literal meaning of the final sentence in the Article 5, paragraph 2. Counsel for the applicant argues that a valid acceptance of a take back request by a requested member State can only be given within the two weeks from the making of the request and that this period cannot be "extended" by the invoking of the "additional procedure" of Article 5.2.

14. The purpose and objective of the Commission Regulation however is to provide the detailed rules needed to give effect to the take back procedures. The context and purpose of Article 5 is to provide a mechanism by which doubts based on possible lack of information or evidence as to the basis of responsibility as between the two States can be resolved while at the same time ensuring that the procedure works expeditiously and efficiently. Thus, under Article 20 (1) (b) of the Dublin II Regulation, a time limit is fixed for the requested Member State's checks and reply to a take back request and this is two weeks where the request is based on the more reliable and immediately ascertainable evidence of the Eurodac hit but is one month in other cases, presumably because more extensive checking may be required.

15. Where the checks lead to a negative reply because the requested Member State considers that the evidence does not establish its responsibility, or leaves open the possibility that its responsibility has ceased under for example Article 16.3 of the Dublin II Regulation, Article 5 of the Commission Regulation provides for an opportunity of re-examination which must be requested within three weeks from the receipt of the negative reply. Clearly, if the object of providing for this possibility of re-examination is to operate and not to be rendered impossible, it must apply as a period which runs from the date of receipt of the negative reply of the requested State. Even if the original take back request was refused within 24 hours, the provision of a three week period for re-appraisal would be deprived of its purpose and effectiveness if it was always to be rendered inoperable two weeks after the date of the original take-back request.

16. In the judgment of the Court, the purpose of the final sentence of Article 5. 2 is to make it clear that once a negative reply has been given by the requested State within the two weeks of Article 20 (1) (b), that period is effectively exhausted or satisfied. It is not re-activated or overridden by the making of a re-examination request. The Court notes that in the French text of the Commission Regulation, the phrase used in place of the reference to "shall not be extended" is "*ne rouvre pas les délais prévus…",* thus connoting the idea that the invocation of the additional procedure is not to re-open the time limits of, *inter alia*, Article 20.1(b). Similarly the Italian text uses the expression "*non riapre*" in that place. In other words, the final sentence of Article 5.2 of the Commission Regulation is a form of "belt and braces" provision to the effect that a request by a requesting Member State, (in this case, Ireland) for re-examination of a negative reply to the original take-back request does not have the effect of extending, in the sense of re-activating or re-opening, the period of two weeks within which the requested State, (in this case, the United Kingdom) must give a reply to the take-back request. In the judgment of the Court, the additional procedure of Article 5 falls to be understood and applied on the basis that the time limits therein fixed take as their starting point the date of a negative reply to the take-back request given by the requested Member State within the two week period of Article 20 (1)(b). Thus, if the requested State gives its negative reply after the expiry of the fourteen day period and the requesting State responds with a demand for re-examination on the basis of new evidence or alleged misappraisal, this will not override the deemed acceptance which operates under Article 20 (1) (c) so as to create a form of estoppel against the requesting Member State on the basis that it had invoked the additional procedure of Article 5 and therefore could not rely on the deemed acceptance.

17. The acceptance by the UK Border Agency on 9 November 2011 was therefore timely and valid. The Court accordingly considers that the interpretation put on the final sentence of Article 5. 2 in this instance, is mistaken and that no fair issue is raised which would satisfy the first limb of the *Campus Oil* test.

18. Furthermore and in any event, this is a case in which the Court would exercise its discretion to refuse to grant interlocutory relief, upon the ground that it would be inequitable and contrary to public order to do so. The purpose of this application for an interlocutory injunction is presumably to preserve the status quo of the applicant's presence in the State, by preventing her removal to the United Kingdom under the Dublin II Regulation. She does not deny, however, that she applied for and was refused asylum in the United Kingdom and that she then entered the State illegally and subsequently obtained employment illegally. It was only when apprehended in Bandon that she made the asylum application which has now been withdrawn. So far as she is concerned, the international protection process has already terminated. She thus has no permission to be in the State under s. 4 of the Immigration Act 2004. To grant an interlocutory injunction in these circumstances would be to intervene in the lawful discharge by the Minister in his statutory obligations under the Immigration Acts of 1999 and 2004 and under the Dublin II Regulation and thus to require the Minister effectively to acquiesce in the continuation of a situation of illegality created by the applicant by her own deception in this State and by her evasion of the laws both of this and of another Member State.

19. The application must therefore be refused.