THE HIGH COURT
JUDICIAL REVIEW

[2020] IEHC 701

Record No. 2020/512/JR

IN THE MATTER OF THE INTERNATIONAL PROTECTION ACT 2015, and IN THE MATTER OF THE EUROPEAN UNION (DUBLIN SYSTEM) REGULATIONS 2018

BETWEEN

MG

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL
THE MINISTER FOR JUSTICE
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Ms Justice Tara Burns delivered on 21st day of December, 2020

General

1. The Applicant is a national of Egypt who made an application for international protection in this jurisdiction on 19 March 2019. He was interviewed by the International Protection Office (hereinafter referred to as "the IPO") pursuant to section 13(2) of the International Protection Act, 2015 on 9 April 2019. Enquiries revealed that his fingerprints had been taken in the United Kingdom on 24 May 2016. Accordingly, he was also interviewed pursuant to Article 5 of EU Regulation 604/2013 (hereinafter referred to as "the Dublin III Regulation"). During that interview, the Applicant disclosed that he arrived in the United Kingdom on 24 May 2016 and thereupon made an application for international protection. This application was subsequently refused whereupon he left the United Kingdom on 16 March 2019 and travelled to this jurisdiction, via Belfast.

2. On 12 April 2019 the IPO made a take-back request to the United Kingdom pursuant to Article 18(1)(b) of the Dublin III Regulation. On 26 April 2019 the United Kingdom accepted responsibility for the application pursuant to Article 18(1)(d) of the Dublin III Regulation.

3. By letter dated 2 May, 2019 the Applicant was informed of the acceptance by the United Kingdom and he was invited to make representations to the IPO regarding any proposed transfer within 10 days. No submissions were made within the permitted period. On 29 May, 2019 the IPO notified the Applicant of its decision determining that the United Kingdom was the appropriate country to examine the Applicant's application for international protection. On 6 June, 2019 the Applicant appealed to the First Respondent and submitted further legal submissions on 25 June 2019.

4. The appeal came before the First Respondent on 9 September 2019 when an adjournment was sought so that a Spirasi medical report could be obtained. The appeal was adjourned to 23 October 2019. On the adjourned date, a Spirasi letter of attendance and a referral letter from the Applicant's GP were submitted. The Applicant sought a further eight weeks adjournment so that a Spirasi medical report could be obtained. The First Respondent allowed the Applicant a further three weeks to submit any further medical documentation, noting that it was unclear whether a Spirasi report was pending. By

letter dated 8 November, 2019 the Applicant re-submitted the medical letters which had already been handed into the First Respondent at the appeal hearing. On 19 February, 2020 the First Respondent requested the Applicant to submit any further medical documentation in support of his appeal within seven days. No response or further medical documentation was submitted by the Applicant.

5. On 25 May 2020, the First Respondent affirmed the decision of the IPO.

6. On 16 July, 2020 the Applicant filed papers seeking leave to apply by way of Judicial Review for an Order of *Certiorari* of the First Respondent's Transfer Decision. A leave application was not made in the matter until November 2020, when a proposed amended Statement of Grounds was before the Court. As other applications relating to the Dublin III Regulation and transfers to the United Kingdom were listed before the Court for telescoped hearings, the Court determined to adjourn the leave application in this matter. Ultimately, the Court ordered that the Respondents be put on notice of the leave application and a telescoped hearing of the proceedings was ordered for 15 December 2020. On that date, a third proposed amended Statement of Grounds was before the Court which sought, in summary:-

   a) An Order of *Certiorari* quashing the Transfer Decision of the First Respondent;

   b) An Order of Mandamus as against the Second or Third Respondents to put in place a system to permit applicants for international protection to apply for discretionary relief under Article 17 of the Dublin III Regulation, and/or assert an effective remedy to any denial of their Article 17(1) claims to which they are entitled under the Dublin III Regulation;

   c) An Order of Mandamus as against the Second Respondent to issue a decision on the Applicant's request pursuant to Article 17 of the Dublin III Regulation;

   d) A Declaration that the uncertainty surrounding the determination of issues under Article 17 and the failure to make an Article 17 decision or to indicate when same shall issue is in breach of the Applicants' rights to fair procedures and effective remedies in Irish and EU law;

   e) Declarations of the legal rights and/or legal position of the Applicant and/or persons similarly situated.

Order of *Certiorari* of the Transfer Decision of the First Respondent

Adverse reliance on the absence of a medical report?

7. The Applicant submits that the First Respondent placed adverse reliance, against the Applicant, on the absence of a medical report which he had sought time to submit. The Applicant's assertion was, that in light of his mental health issues, he should not be transferred to the United Kingdom as he would be unable to obtain appropriate medical treatment there.

8. As noted above, a referral letter from a GP was placed before the First Respondent at the hearing on 23 October 2019 which referred to the Applicant as having issues with PTSD type symptoms. The GP had referred the Applicant to Spirasi for assessment who initially could not offer him an immediate appointment. Due to him expressing suicidal thoughts, she requested an appointment with the psychiatry department in St Vincent's Hospital. However, Spirasi ultimately ended up being able to accommodate the Applicant for an initial assessment on 13 August 2019 and he thereupon commenced individual therapy. A letter of attendance from Spirasi dated 16 October 2019 was handed into the First Respondent at the hearing.

9. It is submitted on behalf of the Applicant that the First Respondent acted irrationally and/or in breach of fair procedures, by placing reliance on the absence of a medical report as part of its overall determination. This adverse reliance, it is submitted, must be viewed in the context of the First Respondent having failed to establish a panel of medical practitioners to whom it could refer an applicant for examination pursuant to s. 23 of the International Protection Act 2015.

10. The First Respondent dealt with the absence of a medical report in respect of the Applicant in the following manner at paragraph 5.16 of its decision:-

> *"In the instance case there is no medical evidence before the Tribunal attesting that the Appellant would be adversely affected by being transferred to the UK. There is no clear evidence that the Appellant would be at risk of suicide and or a serious and permanent decline in his health if he were to transfer to the UK. It was submitted by the Appellant's legal representatives at hearing that the Minister has failed in his duty to the Appellant by not establishing a panel of registered medical practitioners, pursuant to section 23 of the International Protection Act. This was invoked as a criticism of the State but with no apparent prejudice to the Appellant. No submissions have been made that the Appellant was unable to obtain a medical assessment. The Tribunal notes that the Appellant submitted medical reports and was given ample opportunity to obtain further medical documentation in respect of his appeal."*

11. In light of the history set out above regarding how the appeal was progressed before the First Respondent, it was entirely open to the First Respondent to state that the Applicant had been given "ample opportunity" to obtain further medical documentation. However, with reference to above quoted paragraph, it is important to note that the Applicant had not sought that he be examined pursuant to s. 23 of the International Protection Act 2015. Rather, the Applicant had sought that the First Respondent consider the medical evidence, which had been submitted, at its height in light of the fact that there was not an established panel of medical practitioners pursuant to s. 23 of the 2015 Act. Furthermore, it is important to note that the First Respondent adopted this requested approach. It stated at paragraph 5.13 of its decision:-

> *"The Appellant's legal representative submitted that the Appellant suffers from PTSD and may not be able to avail of medical care in the UK. The Appellant was*

referred to Spirasi by Dr Sinead Cronin. In her referral letter, Dr Croninn states that the Appellant attended her practice quite angry, saying that no one is helping him and that he was going to take his own life. The Appellant was described as distressed and feeling very isolated in Ireland. The Spirasi attendance letter states that the initial clinical assessment of the Appellant's mental health status indicated a range of psychological symptoms which were a direct result of traumatic events. At the time of his referral, the Appellant's doctor Sinead Cronin cites "post-traumatic stress disorder and intrusive nightmares". When he came for his initial assessment, the examining physician in Spirasi recorded similar symptomology as well as difficulties with sleep and mood". The multi-disciplinary team found that the Appellant would benefit from going to therapy in Spirasi and noted that he had attended 3 appointments in total and expressed the intention of continuing the work."

12. The Court does not interpret the reference by the First Respondent to the Applicant having had "ample opportunity" to submit further medical evidence, as an adverse finding against him. Rather, the First Respondent accurately characterised the factual situation, namely that the First Respondent had had a significant period of time to provide further medical information. Counsel for the Applicant argues that the Respondent only ever gave the Applicant three weeks and a further week to submit further medical evidence, but that submission fails to recognise the reality of the situation which was that the hearing had been adjourned from 9 September so that such material could be obtained and that the matter was not determined until May 2020 with the Applicant having knowledge that by 19 February 2020, the First Respondent had not determined the matter and was providing a further opportunity to him to provide such material. No response was submitted by the Applicant to that final request by the First Respondent on 19 February 2020 to submit any further medical documentation within a week. The assertion that the First Respondent acted irrationally or unreasonably in this regard is simply not made out.

CK v. Slovakia

13. The Applicant further submits that the First Respondent erred in finding that there was no evidence before it that the Applicant came within *CK v Slovakia*, CJEU, C – 578/16, such that the Applicant could not be transferred based on individual suffering he would endure by virtue of the transfer process itself. The First Respondent considered the medical evidence before it and found no evidence that the Applicant would be adversely affected by being transferred to the United Kingdom. This was a finding which was plainly open to the First Respondent to make having regard to the medical evidence before the First Respondent which has already been cited.

Breach of fundamental rights and availability of remedy before the Courts of the United Kingdom

14. The Applicant also submits that the First Respondent erred in irrationally determining that the Applicant's complaint as to any infringement of human rights could be answered by recourse to the United Kingdom domestic Courts by citing a judgment of the UK Court of Appeal of their willingness to intervene where such breaches occur.

15. This is an incorrect characterisation of the First Respondent's findings in this regard. The First Respondent noted that the Applicant's submission was that because he is the subject of a deportation order in the United Kingdom, he almost certainly would be subject to pre-removal detention. It was asserted that this policy of detention was in breach of the Applicant's rights under Article 4 Charter/Article 3 ECHR. The First Respondent directed itself according to case law of the CJEU and noted that the test was whether there was a substantial risk that an international protection applicant may, when transferred to another Member State, be treated in a manner incompatible with his fundamental rights. It also noted Article 3(2) of the Dublin III Regulation which prohibits the transfer of an applicant seeking international protection where there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the other Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union. The First Respondent considered an AIDA report and a report from the Guardian newspaper which had been submitted to it by the Applicant and noted that the United Kingdom had a similar right of access to the Courts as this jurisdiction.

16. Having considered these matters, the First Respondent was satisfied that:-

> *"[T]he UK exercises a robust rule of law and courts system that can be applied in the event of unlawful or arbitrary detention in the UK. The Tribunal is not satisfied from reviewing the submissions made that there is a real risk of a breach of Article 3 in respect of the specific Appellant if returned to the UK on this basis [5.12]*
>
> *The Tribunal has considered the AIDA report, which does not disclose systemic flaws in the UK asylum process or reception conditions [5.14]….*
>
> *The Tribunal has considered the facts as contended by the Appellant of the difficulties he would face in the United Kingdom. On the basis of the information in the AIDA report when considered with the Appellant's personal circumstances, the Tribunal concludes there are no substantial grounds for believing there are systemic flaws in the asylum procedure or reception conditions for asylum applicants in the United Kingdom reaching the threshold for torture, inhuman or degrading treatment within the meaning of Article 4 of the Charter or its equivalent of Art. 3 of the Convention. [5.17]*
>
> *The Tribunal finds that the Appellant has not rebutted the presumption that the treatment of the Appellant by the UK authorities will comply with the Charter, the Geneva Convention and the ECHR. The Tribunal concludes that there is no basis for finding that the terms of Article 3(2) of the Dublin Regulation have been satisfied that Ireland should be deemed responsible for examining the Appellant's claim. [5.20]"*

17. These were findings which were open to the First Respondent to make. It has not been established that these findings were irrational and/or unreasonable.

Prejudicial Comment regarding Article 17 discretion

18. The final challenge to the First Respondent's decision is that the First Respondent expressed a view that the Applicant could not succeed with respect to his application for discretion to be exercised not to transfer him pursuant to Article 17 of the Dublin III Regulation.

19. In *NVU v. The Refugee Appeals Tribunal* [2020] IESC 46, the Supreme Court determined that the Second Respondent retained the discretionary power, pursuant to Article 17(1) of the Dublin III Regulation, not to enforce a Transfer Decision in respect of an applicant for international protection. The issue of who could exercise this discretion had been a matter of debate for a considerable period. The High Court in *U v. RAT* [2017] IEHC 490 had found that this was a discretion vested in the Second Respondent, whereas on appeal, the Court of Appeal in *NVU v. RAT* [2019] IECA 183 found that the Article 17 discretion vested in the deciding bodies, namely IPO and the First Respondent at the time an application for transfer was before them. A stay had been placed on the decision of the Court of Appeal until the determination of the Supreme Court appeal.

20. The Applicant had requested the First Respondent to exercise the Article 17(1) discretion in his favour so as to not affirm the transfer order.

21. The Applicant submits that in a situation where the First Respondent does not have jurisdiction to exercise the Article 17(1) jurisdiction, the comments made by the First Respondent were inappropriate and will prejudice the Second Respondent when she comes to decide an Article 17 application.

22. The comments made by the First Respondent were made because of the very unusual and particular circumstances at play at the time of its decision. The First Respondent was in reality riding two horses: if the stay placed on the Court of Appeal decision was lifted, thereby giving the First Respondent jurisdiction to exercise the Article 17(1) discretion, the First Respondent would have dealt with this issue. Ultimately, the NVU case determined that the First Respondent did not have jurisdiction to exercise the Article 17(1) discretion pursuant to the Dublin III Regulation. Accordingly, this comment by the First Respondent has no legal effect.

23. The issue is whether these sentiments invalidate the First Respondent's decision, or alternatively should be excised from the decision.

24. A similar issue arose is a related case before me recently, namely *LK v. IPAT and Ors* (Unreported, High Court, Burns J., 4th December 2020) wherein I stated at paragraph 40 of the judgment:-

> *"While these sentiments are adverse to the Applicant's Article 17(1) application, the reality is that they should have no bearing on the decision making process of the Second Respondent. Any Article 17(1) decision made by her in the future, is a determination of a new issue being made for the first time. The Second Respondent must have regard to that fact. Her decision, is of course, nothing in*

the nature of an appeal and accordingly, any comment made by the IPO or the First Respondent in relation to the exercise of the Article 17(1) decision simply has no relevance to the Second Respondent's decision. In light of the manner in which the Second Respondent must approach her task in relation to an Article 17(1) application, it appears to me that it is inconceivable that the Second Respondent would be swayed by this negative commentary. Furthermore, the Second Respondent is an entity well used to making decisions in the asylum and immigration arena. As a professional and experienced decision maker within that field, the ability to place irrelevant prejudicial material from her mind is a skill already well-rehearsed and practised by her Department."

25. I see no reason to depart from my previous decision in relation to this matter. Accordingly, the prejudicial comments, do not effect the validity of the First Respondent's decision such that it should be quashed or alternatively, the comments expunged from it.

Mandamus Order against the Second Respondent to determine an Article 17 application

26. The Applicant seeks an Order of Mandamus compelling the Second Respondent to determine an Article 17 application pursuant to the Dublin III Regulation which he asserts that he has made. It is accepted by him that a formal application has not been made to the Second Respondent, however, it is asserted that by virtue of his application for such relief before the First Respondent, that the Second Respondent has been aware of such an application since the First Respondent's transfer decision was notified to her on 6 July 2020.

27. I do not accept that the making of an Article 17 application to the First Respondent equates with an application being made to the Second Respondent. While the Second Respondent may have been aware that such an application had been made by the Applicant as a result of the outcome of the First Respondent's affirmation of the Transfer Decision and the file being sent to the Second Respondent, this does not amount to a formal application being made to the Second Respondent.

28. In those circumstances, the relief of Mandamus compelling the Second Respondent to determine an Article 17 application does not arise.

A requirement to put in place a system for applications pursuant to Article 17 of the Dublin III Regulations and to provide for an effective remedy against a refusal to grant Article 17 relief?

29. The Applicant seeks an Order of Mandamus compelling the Second and Third Respondents to put in place a system for applications pursuant to Article 17 of the Dublin III Regulations and to provide for an effective remedy against a refusal of Article 17 relief.

30. The Dublin III Regulation does not provide for a system for Article 17 applications. Indeed, Article 17 relates to Members States retaining a discretion to consider an application for international protection within its jurisdiction even if such examination is not its responsibility under the criteria laid down in the Regulation.

31. The requirement for the adoption of criteria has been considered by the Irish Courts. In *U v. RAT* [2017] IEHC 490, O'Regan J found at paragraph 30 of her judgment that there was no requirement to adopt any particular system in this regard. On appeal to the Court of Appeal, in *NVU v. RAT* [2019] IECA 193, the Court of Appeal stated at paragraphs 114 and 115 of its judgment that the exercise of discretion is not one constrained by policies or criteria and that therefore there was no obligation for the Minister to publish any such criteria. In two recent decisions delivered by this Court, *TAO v. Minister for Justice* (Unreported, High Court, Burns J., 8th December, 2020) and *AHS v. IPAT* (Unreported, High Court, Burns J., 8th December, 2020), I found that on the specific facts of those cases and the time lines involved, issues of transparency did not arise and that a breach of EU law had not been established.

32. The CJEU also has found in *Halaf* Case C-528/11 (paras 35-37) and *CK* Case C-578/16 (paras 88 and 96) that the exercise of Article 17(1) discretion is not subject to any particular condition.

33. It is clear that neither EU law nor domestic law requires a system be put in place relating to Article 17 applications and the exercise of the Second Respondent of her discretion. The applicant was quite capable of making an Article 17 application to the First Respondent but has failed to make such an application to the Second Respondent in circumstances where the Second Respondent has been identified definitively as the appropriate entity to make such an application to since the delivery of the Supreme Court decision in *NVU v. RAT* on 24 July 2020.

34. With respect to the asserted failure to provide for an effective remedy against an adverse decision pursuant to Article 17, the CJEU in MA v. IPAT stated at paragraph 79 of its judgment:-

> *"Consequently, Article 27(1) of the Dublin III Regulation must be interpreted as meaning that it does not require a remedy to be made available against the decision not to use the option set out in Article 17(1) of that regulation, without prejudice to the fact that that decision may be challenged at the time of an appeal against a transfer decision."*

35. Of course, in this jurisdiction the availability of the remedy of Judicial Review is open to an applicant aggrieved by an adverse decision pursuant to Article 17. The Applicant has failed to explain why such system is defective for the purposes of a reviewing an asserted erroneous decision.

36. The Applicant has failed to establish why an order of Mandamus as specified is required.

37. The Applicant has failed to establish that he has suffered any prejudice or unfairness with respect to the operation of Article 17 relief, particularly in circumstances where he has not made a formal request to the Second Respondent to consider same. Accordingly, the declaratory relief which he seeks paragraph D d) and e) does not arise for consideration.

38. An issue arose, in the pleadings, with respect to the Applicant's identity. A further affidavit was sworn by the Applicant to deal with this. In light of my findings with respect to the reliefs sought, I do not propose addressing the issue raised.

39. Accordingly, I am refusing the Applicant the reliefs sought and I will make an order for the Respondent's costs as against the Applicant to be adjudicated on in default of agreement.