

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 358
[Record No. 2021/729JR]

BETWEEN

M

APPLICANT

AND

**INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR
JUSTICE**

RESPONDENTS

***EX TEMPORE* JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 20th day of May, 2022**

Background

- 1.** This judicial review application is made by the applicant, a 26-year-old Iranian citizen who came to Ireland on 2 August 2020 and applied for international protection on 17 August 2020, which resulted in a Eurodac inquiry on 18 August 2020. The results of the inquiry show that the applicant had applied for international protection in Belgium on 10 November 2015, in Sweden on 17 November 2015, and in the UK on 22 July 2020.
- 2.** On 2 October 2020 during a s.5 interview, the applicant was asked how long he stayed in Sweden after he was fingerprinted and he stated he stayed until 17 February 2020 (question 10). Accordingly, he was in Sweden for just over four years following his first entry.
- 3.** During the interview he was asked what the outcome of his application for protection in the UK was and he said he didn't apply so he doesn't know (question 12).
- 4.** In the events, Ireland requested both Sweden and the UK to take the applicant back under the provisions of the Dublin III EU Regulation on 5 October 2020. On 14 October 2020 the UK refused on the basis that Sweden had previously accepted the applicant.
- 5.** On 15 October 2020 Sweden accepted the return of the applicant. In their letter they say that "the person mentioned above is accepted in accordance with Article 18(1)(d) of the Regulations".
- 6.** A notification of a transfer order of 19 February 2021 was appealed by the applicant on 5 March 2021, with the International Protection Appeals Tribunal (IPAT) making a refusal on 30 April 2021, which was sent to the applicant on 5 May 2021. It seems to me insofar as the relief of an extension of time is incorporated in the statement of grounds, no such relief is required.

Issues

7. Following the refusal of 30 April 2021 leave was sought on 26 July 2021 and was granted on 29 July 2021. The statement of grounds is dated 23 July 2021 and in it *certiorari* of the decision is claimed on the basis that IPAT erred in upholding the transfer decision on appeal and concluding that Sweden was the relevant Member State.

8. The applicant asserts that the Tribunal also erred in concluding that Article 23 of the Dublin III Regulation makes Sweden the responsible Member State. This assertion is made on the basis that it was claimed that Article 23 is not a "criteria" and responsibility is to be identified by reference to Article 3 and Chapter III of Dublin III Regulation, with Article 23 falling outside those provisions.

9. It is also said that IPAT erred in concluding that Article 3(2) is not applicable and they erred in basing the decision on the factual conclusion that Sweden did not make a take back request of Belgium. The essence of the applicant's argument is that one is assessed as a Member State under the terms of Chapter III of Dublin III, or effectively under Article 3(2), but not otherwise.

10. As Belgium was the first country in which the application was made and as it is acknowledged that the Chapter III requirements are not met (family reunification or a minor), it is alleged under Article 3(2) of Dublin III that Belgium is the correct Member State responsible for examining the applicant.

11. In the events Article 3(2) provides "Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it."

12. Hence the argument made by the applicant that he should have been sent back to Belgium and that the application to take back should have been made under Article 23 within two months and as it wasn't, Ireland is now the responsible Member State.

13. In that regard, Article 23 does place a time limit to make a take back application of two months and if that take back application is successful then a Member State has a further six months to effect the transfer. Under both Articles 23 and 29 there is a default provision identifying the defaulting Member State as being the responsible Member State.

14. Article 23 (3) provides "Where the take back request is not made within the periods laid down in paragraph 2, responsibility for examining the application for international protection shall lie with the Member State in which the new application was lodged."

Jurisprudence

15. A number of cases were opened to the Court including:

(a) *Mengesteab v. Germany*, Case C-670/16, ECLI:EU:C:2017:587, where at para. 51 Article 21(1) was engaged and that involved a take charge request which was to be made within three months. In para. 52 it was stated that EU legislation defined the effects of the expiry of time limits, and if not made within the period provided for, responsibility for the examination of a particular claimant passes to the Member State where the application was lodged. Under para. 53 it is said that Article 21(1) is intended to provide a framework and contribute in the same way as criteria in Chapter III of the Regulations to determine the responsible Member State.

The applicant relies on this judgment to the effect that agreement in general cannot lead to responsibility under the Regulations. In my view it wasn't just agreement from Sweden — Sweden said they would take the applicant back but they specified they would take him back under Article 18(1)(d) which essentially advises the Member State (being Ireland) that they had already determined his international protection application.

Also, this case is authority to suggest that the criteria in Chapter III are not the only provisions identified within the Dublin III to fix a Member State with responsibility. Perhaps the default provisions might not have been specified as "criteria" but nevertheless it is clear that default provisions have the impact of transferring responsibility.

(b) In *Shiri v. Bundesamt für Fremdenwesen und Asyl*, Case C-201/16, ECLI:EU:C:2017:805, Article 29 was engaged. There was a failure to transfer within the time limits and it was held that there was an automatic transfer of responsibility and the Court also reiterated the jurisprudence provided in para.53 of *Mengesteab* aforesaid, namely that the default framework contributes in the same way as criteria in Chapter III.

(c) In *X v. Staatssecretaris van Veiligheid en Justitie*, Case C-213/17, ECLI:EU:C:2018:434, at para. 35 it was stated that it follows from the wording of Article 23(3) and the general scheme and objectives of Dublin III, that in default, responsibility is transferred in full. At para. 38 it was acknowledged that the application of the scheme provided in Dublin III may result in a second application of the particular claimant in a second Member State.

(d) In the joint cases of *H. & R. v. Staatssecretaris van Veiligheid en Justite*, Joined Cases C-582/17 and C-583/17, ECLI:EU:C:2019:280, at para. 64 it was recorded that the Regulation sets out specific obligations on the first Member State and that that Member State is thus granted a special status.

It doesn't appear to me that that makes any material difference in the conclusions in this matter.

At para. 73 it is stated that the argument to the effect that a take back request may be made only if the requested Member State can be designated as a Member State responsible pursuant to the criteria for determining under Chapter III is at variance with the general scheme of the Regulation.

Accordingly, the argument now presented by the applicant is at variance with the general scheme of the Regulation.

Under para. 77 it is provided that it is not intended to look behind the response of the accepting Member State as it would lead to additional applications and it would lead to an examination by one Member State of another Member State.

This in my view is consistent with the implementing Regulation for Dublin III — Article 6 of Regulation 1560 of 2003 which provides if the requested Member State accepts responsibility they must reply and say what specific provision of Dublin III is taken as the basis for accepting — in this regard Sweden said the basis was Article 18(1)(d).

Decision

16. I am satisfied that Sweden didn't just volunteer an acceptance of responsibility, and Article 6 of Regulation 1560 of 2003, and the *H. & R.* decision aforesaid, are consistent with the proposition that each Member State makes the presumption that the other Member State carried out the appropriate checks. Accordingly, there is no need to look behind the decision of Sweden.

17. There is an error in my view in the assessment by IPAT, in that IPAT comes to the conclusion that Sweden failed to make a take back request to Belgium in circumstances where there was no evidential basis for that suggestion. In my view it was either Sweden failed to make a take back request or failed to make a transfer for whatever reason, possibly because they voluntarily decided that they would deal with the applicant, but the reason doesn't matter as the reality is that they had two months to make the take back request and if they didn't a default provision applied. If they had made such a request and if Belgium had accepted, Sweden had six months to effect a transfer — if they did not Sweden would be the responsible Member State. In these events Sweden had less than a year after the applicant arriving in Sweden to return the applicant to Belgium otherwise by default Sweden would be the responsible Member State.

18. It is manifest that the default occurred in either the take back or the effective transfer between Sweden and Belgium. Accordingly, at that point (the precise date not known because it is not known what Sweden did), but in any event within the first year namely before the end of 2016 Sweden was responsible and there is nothing in the

legislation to suggest that once responsible you lose that responsibility save in accordance with Dublin III.

19. In the circumstances therefore, even though there is an error insofar as it asserted as a matter of fact that Sweden did not make a take back request, nevertheless, because it is manifest that there was default of one description or another under Article 23 and/or Article 29 of Dublin III, Sweden under Dublin III was considered by the end of 2016 as being the relevant responsible Member State, and therefore it does appear to me that notwithstanding the asserted matter of fact without an evidential basis, nevertheless, this is an appropriate matter in which I would exercise my discretion and not grant the relief of *certiorari*.

20. For the above reasons the applicant's application for *certiorari* of the decision of 30 April 2021 is refused.

Costs

21. Having heard the parties on the issue of costs, I am satisfied that the respondent is entitled to 50% of its costs to be adjudicated in default of agreement.

22. A stay on this Order and an injunction preventing the respondent transferring the applicant to Sweden is made for the period in which the applicant might appeal this Order and if an appeal is lodged such period will be extended to the first directions date before the Court of Appeal.