THE HIGH COURT

[2023] IEHC 742

Record No. 2023/1131HJR

BETWEEN

RG

APPLICANT

and

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

RESPONDENTS

JUDGMENT of Ms. Justice Hyland delivered 19 December 2023

Summary of Decision

1. This case concerns a challenge to a transfer decision under Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013, (commonly referred to as the Dublin III Regulation), whereby the International Protection Appeals Tribunal (the "IPAT") upheld a decision of the International Protection Office (the "IPO") to transfer a Georgian man who sought international protection in Ireland back to France. He had previously made an unsuccessful application for international/subsidiary protection in France. He now seeks an injunction restraining his transfer/a stay on the transfer decision, pending the determination of the judicial review proceedings he has brought challenging the IPAT decision. In order to carry out the requisite balance of justice exercise to decide whether I should grant an injunction or stay, I must first decide on the consequences under the Dublin III Regulation if an injunction/stay is granted.

2. Subject to some exceptions, the Dublin III Regulation provides that if a person is not returned to the Member State who has agreed to accept responsibility for them (in this case France) within six months of the relevant date, then the returning Member State (in this case Ireland) shall be responsible for the person and there is no obligation on the other Member State to take the person back. Here, the relevant date is six months from the final decision of the IPAT, being either 19 or 20 February 2024.
3. The respondents argue that, given that it is very unlikely that the substantive case will be heard and determined prior to 20 February, a grant of an injunction/stay will effectively determine these proceedings. This is because, once the six months has elapsed, France will no longer be responsible for the applicant and instead Ireland will be treated as assuming responsibility for the applicant under the terms of the Dublin III Regulation. That means the validity of the transfer decision is effectively irrelevant since, even if it is upheld, France will no longer be under any obligation to take back the applicant. It is in those circumstances that the respondents argue that the balance of justice means that there must be a refusal of the injunctive relief.
4. The applicant's answer is that a stay imposed by this Court on the decision of the IPAT means that there is no final decision of IPAT under the terms of Dublin III and therefore the six month period will not expire until the determination of these proceedings, thus altering the balance of justice arguments.
5. In summary, for the reasons set out below, I have concluded that any stay on the transfer decision imposed by this Court will not stop the six month time limit running from the date of the IPAT decision and that the imposition of a stay

would therefore very likely prevent the respondents being able to exercise their entitlement to request France to take back the applicant.

6. That is because Articles 27 and 29 of the Dublin III Regulation set out a self-contained regime that provides both for an effective remedy and time limits within which a transfer must take place. A person is entitled to appeal or review a first instance transfer decision and while that is taking place, the person can remain in the Member State seeking to transfer them, as the transfer decision is suspended. However, once a final decision is given by the body carrying out the second instance appeal/review, Article 29(1) explicitly provides that the six month time limit starts to run. If a Member State choses to provide for a third layer of decision making (in this case judicial review) nothing in the Regulation prevents it from doing so. Equally, it can suspend the transfer decision afresh in the context of that review as a matter of domestic law. But in my view, a Member State cannot interfere with the regime established by the Regulation, whereby the six month time limit runs from the final decision of the body entrusted with the second instance appeal/review.

7. In Ireland, that body is the IPAT as identified in S.I. No. 62 of 2018 - European Union (Dublin System) Regulations 2018 (the "2018 Regulations"). Accordingly, any stay or injunction restraining the applicant from being transferred will not stop the six month time limit from running from the date of the IPAT decision.

Factual Background

8. This an application for an injunction restraining the third respondent including the Garda National Immigration Bureau (the "GNIB") from taking any steps in relation to the removal of the applicant pending the determination of the within

proceedings. In the written legal submissions lodged in support of the application, reference is made to a stay on the decision under challenge, being a decision of the IPAT. In fact, no stay was sought in the pleadings and the applicant simply sought an injunction restraining the Minister from deporting him. However, given that the question of the stay was argued between the parties, and given the urgency with which the matter was listed for hearing, I am prepared to treat the matter as one where both a stay and an injunction were sought.

9. On 20 September 2023 the IPAT affirmed the notice of decision to transfer the applicant to France made by the IPO (the "transfer decision"). The applicant had sought international protection in the State. The chronology of events is set out in the applicant's legal submissions for leave. In short, the applicant applied for international protection in Ireland on 21 September 2022. Eurodac hit results resulted in a category 1 hit with France which disclosed that he had lodged an application for international protection in France on 25 March 2022. On 27 September 2022 the IPO issued a take back request to France under Article 18(1)(b) of the Dublin III Regulation. On 10 October 2022 France agreed to accept responsibility under Article 18(1)(d) i.e., where an application for international or subsidiary protection had been denied. On 5 December 2022 the applicant was informed that France had accepted responsibility for him.

10. On 15 December 2022 his solicitors furnished submissions to the IPO setting out that the applicant had been detained and beaten in France by the individuals from whom he had fled from Georgia. Photos of the injuries, screenshots of threatening messages and a medical certificate from a Georgian hospital were submitted.

11. On 16 January 2023 the applicant was interviewed under Article 5 of the Dublin III Regulation.

12. On 16 February 2023 the IPO issued the transfer decision whereby it noted that France had accepted Ireland's request in accordance with Article 18(1)(d) of the Dublin III Regulation i.e., on the basis that the applicant had sought international/subsidiary protection in France and that his application had been rejected there.

13. On 20 February 2023 the applicant appealed to the IPAT against the transfer decision. On 16 April 2023 a medical report was submitted by a Dr. Giller, obstetrician/gynaecologist and psychotherapist, to the IPAT which concluded that the evidence was consistent with his history of torture in Georgia, his re-traumatisation by an incident in a hostel in France during which Georgian men attended his hostel and ransacked his room when he was not present and his fear of being returned to France where he was terrified of deportation to Georgia. Dr. Giller, opined that if he was returned to France he would present as being at a serious/high risk of suicide. Further submissions were made on 17 April 2023 by his solicitors, who argued *inter alia* that his return would infringe his rights under Articles 4 and 7 of the Charter of Fundamental Rights and Articles 3 and 8 of the European Convention on Human Rights ("ECHR") and that the applicant was at risk of refoulement.

14. On 20 September 2023 the IPAT issued a decision refusing the applicant's appeal. Leave to bring judicial review proceedings was granted on 23 October 2023. The matter came before me on 28 November 2023. The respondents appeared and objected to the application.

15. In view of the short notice at which the hearing was arranged, it was agreed at the end of the hearing that both counsel would be given an opportunity to file written submissions and that was done on 6 December. I am very grateful to both counsel for the detailed submissions provided, both orally and in writing.

Dublin III Regulation

16. To determine the effect of any stay, it is necessary to carefully consider the terms of the Dublin III Regulation. It is fair to say that the Regulation has been extensively considered by the Irish courts, most recently in a comprehensive fashion by the Court of Appeal in *M.M. v International Protection Appeals Tribunal & The Minister for Justice* [2023] IECA 290. It has also been considered (albeit in the context of arguments in respect of Article 17 of the Regulation concerning Ministerial discretion) variously by the High Court, the Court of Appeal and the Supreme Court in *NVU v The Refugee Appeals Tribunal*, [2017] IEHC 490, [2017] IEHC 613, [2019] IECA 183 and [2020] IESC 46, as well as in *BK v The Minister for Justice* [2022] IECA 7 and *AHY v The Minister for Justice* [2022] IEHC 198 (31 March 2022), which has resulted in a reference to the CJEU.

17. The Regulation has also been extensively considered in various decisions of the CJEU, most recently in an important decision of 30 November 2023, in Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21 ECLI:EU:C:2023:934 (hereafter referred to as "CZA"), a decision handed down after the hearing in this matter but before the parties provided written submissions. I gratefully adopt the various descriptions of the Regulation and do not propose to repeat same.

18. However, the following features of it are necessary to emphasise in the context of this application. The purpose of the Dublin III Regulation is to determine which Member State is responsible for examining an application for international protection lodged in a Member State by a third country national. The situation is simple where no application has been made prior to the first application in a Member State (at least if one of the special categories are not identified) – the Member State in which the application is made is responsible for examining it. However, a person may, for example, have made an application in one or more Member States, and then moved to another Member State and made a fresh application. In such a situation, it is necessary to look to the Regulation to understand how that situation is to be addressed. In the preamble to the Regulation at Recital 4, it is noted that the conclusions of the European Council, reached following its special meeting in Tampere in October 1999, were that there ought to be a clear and workable method for determining the Member State responsible for the examination for an asylum application. Recital 5 identifies the following principle:

> *"It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of application for international protection."*

19. Recital 19 identifies that in order to guarantee effective protection of the rights of the person concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers should be established and that an effective remedy should cover both the examination of the application of the

Regulation and the legal and factual situation in the Member State to which the applicant is transferred.

20. Article 3(1) obliges the Member State to examine any application for international protection by a third country national who applies in their territory and provides that the application shall be examined by a single Member State as identified by the application of the criteria in Chapter III. However, by way of derogation from Article 3(1), each Member State may decide to examine an application for international protection even if such examination is not its responsibility under the criteria laid down in the Regulation. The details of how that discretion may be exercised are set out in Article 17(1), which is described as a discretionary clause. I must emphasise that this is not a case to which Article 17 applies and therefore does not present the problems that were present in *BK* and *AHY*, both of which addressed decisions made under Article 17. Having said that, certain of the observations in the Advocate General's Opinion in *AHY* (quoted below) go beyond the problems thrown up by Article 17 and are of relevance to the instant situation.

21. Turning to the significant provisions for the purpose of this decision, Article 18 identifies that a Member State is obliged to take charge or take back an applicant whose application is under examination by another Member State, was withdrawn in another Member State or was rejected in another Member State. Of particular relevance to this application is Article 18(1)(d) whereby a Member State is obliged to take back a third country national whose application for international protection has been rejected in another Member State. It is notable that, throughout the Regulation, there are a number of instances whereby

Member States can lose their right to rely on the regime identified by the Dublin III Regulation if they fail to comply with relevant time limits in the Regulation.

22. Critically for the purpose of this application, Article 29(1) provides that the transfer of an applicant or a person under Article 18(1)(d) shall be carried out as soon as practically possible and at the latest within six months (emphasis added) of acceptance of the request by another Member State to take charge or to take back the person or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3). The consequences of a failure to comply with this time limit are made quite clear by Article 29(2). This provides as follows:

> "*Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State.*"

23. This is an important provision in the context of this application. As identified above, Article 29 has the effect that if the take back transfer does not take place within six months of the decision of the IPAT (being the final decision on an appeal or review under Article 29), then the regime established by the Dublin III Regulation does not apply and Ireland takes responsibility for the applicant. Here, if the applicant is not returned by latest 20 February 2024, France has no obligation to accept him, and Ireland is responsible for him. It is notable that the only exceptions to this condition are in relation to factors that do not apply here i.e., where the transfer could not be carried out due to imprisonment of the person concerned or absconsion by the person. Even in those instances the maximum extension of time is eighteen months.

24. If on the other hand a person is wrongly taken back, the consequences can be reversed. Article 29(3) provides as follows:

> "*If a person has been transferred erroneously or a decision to transfer is overturned on appeal or review after the transfer has been carried out, the Member State which carried out the transfer shall promptly accept that person back*".

25. For fairly obvious reasons those two provisions are highly relevant to the balance of justice that I must consider. That is because there is an irrevocable consequence to the six months' time limit not being complied with i.e., Ireland cannot avail of the Dublin III regime and must effectively treat the applicant as if he were making the application for international protection for the first time in Ireland. That would render these proceedings effectively moot since, even if the legality of the decision is upheld, Ireland has lost the right to require France to take back the applicant under the Dublin III regime. On the other hand, if the applicant is transferred back to France, and these proceedings conclude the transfer was unlawful, the applicant must be returned to Ireland.

Submissions of the parties

26. Counsel for the applicant argued that the consequences outlined above can be avoided if I stay the IPAT decision because, in that case, the six-month time limit will not run, thus minimising any prejudice to the respondents. He identified in his submissions the previous High Court Practice Direction 81, whereby a global stay was automatically granted if an Article 17 issue was raised under the Dublin III regime. He accepted that this global stay was disapplied by the decision of Burns J. in *LK v. IPAT* [2020] IEHC 616 on the

application of the respondents but points out that no argument was made in that case, unlike in the instant case, that the stay had no effect on the six month clock.

27. The applicant argued that a stay under Order 84 would stay the effect of the transfer decision, including the running of time under Article 29(1). Reliance was placed upon the comments of Hogan J. in *TAJ v The Refugee Appeals Tribunal and Minister for Justice and Equality* [2015] IECA 127. In that case, a Bangledeshi applicant, applied for asylum in Ireland but information from the UK indicated he had previously obtained a visa there. A take back request was made by Ireland to the UK and the request was accepted by the UK. The applicant unsuccessfully appealed to the Tribunal against the transfer decision.

28. The applicant issued judicial review proceedings and sought an Order restraining his return to the United Kingdom prior to the determination of the judicial review proceedings. The High Court refused to restrain his return and the matter was appealed to the Court of Appeal. Ryan P. noted that under its domestic regulations, the State had granted a right to remain in the State pending the outcome of the appeal or review identified in Article 27. At paragraph 21 he observed as follows:

> *"Does the appeal review include the judicial review proceedings now taken by the applicant? In my view, the answer to that is no. The appeal review is properly considered a matter of domestic law, not a matter of EU law. The EU law provisions are the provisions I have outlined and they provide for the effective remedy that is available to the applicant."*

29. Ryan P. referred to the judgment of MacEochaidh J. in the High Court where he observed that the availability in Ireland of judicial review was not a requirement of EU law but a matter of domestic law. He caveated the judgment of the Court

to a certain extent by indicating it had been prepared overnight and therefore "*was not intended to be overly authoritative by way of precedential value*" in respect of the correct interpretation of the Dublin III regime.

30. Although concurring with the judgment of Ryan P., Hogan J. observed that he did not consider that the issues presented on the appeal were *acte claire* and that it would be convenient and appropriate that:

> "*these precise issues, namely, whether the judicial review proceedings constitute a review within the meaning of Article 29(1) of the Dublin III and the general interaction of Article 27 and Article 29 of Dublin III should be referred to the Court of Justice"*

However, he concluded that no reference should be made given the urgency and interlocutory nature of the matter.

31. Reference was also made by the applicant to the decisions in *BK* and *AHY*, and to the reference to the CJEU in *AHY* that remains pending following the decision of the Advocate General. Reliance was placed upon Ferriter J.'s finding in *AHY* that procedural arguments were relevant to the balance of justice, including his finding that the applicant had raised issues of general importance as to the proper interaction between Articles 17, 27 and 29.

32. The respondents on the other hand argued that any stay would not stop the six month time period for the following reasons. First, they relied upon the decision of *TAJ*, above, where an injunction was refused. They argued that the central issue is the balance of convenience. They referred to the provisions of the Dublin III Regulation in detail, and to the 2018 Regulations, noting that those Regulations designated the appeal to the IPAT as the effective remedy in Irish law for the purpose of giving effect to Article 27(1) of Dublin III. They note

that both Regulation 6(1) of S.I. No. 525 of 2014 – European Union (Dublin System) Regulations 2014 (the "2014 Regulations") and 8(1) of the 2018 Regulations only apply to transfer decisions and the right to remain provided applies only to appeals taken to the IPAT and not to judicial reviews. They argue that the plain wording of Article 27 coupled with the implementing provisions in Irish law do not allow for any other result than that arrived at in *TAJ*.

33. Separately, the respondents refer to the Opinion of Advocate General Pikamäe in Case C-359 *AHY* v *Minister for Justice* (ECLI:EU:C:2023:678), where he found that the question of whether a challenge by way of judicial review under Irish law has suspensive effect is a matter exclusively of domestic law, and then went on to look at the time limits in Article 29(1) of Dublin III. They emphasise in particular paragraph 101 of his Opinion, discussed below. It is acknowledged by the respondents that his comments arise in the context of a refusal to exercise discretion under Article 17(1) rather than a challenge to a transfer decision but nonetheless they contend they remain relevant.

Discussion and Decision

34. Because of the qualification to the decision in *TAJ*, I consider it is at least open to the applicant to seek to persuade me that the judicial review proceedings have a suspensive effect on the IPAT decision and/or that a stay on the IPAT decision would stop the six month limit from running. It seems to me there are two separate strands to the applicant's arguments in this respect. The first is the point identified by Hogan J. in *TAJ* i.e., that the judicial review proceedings ought to be treated as a review/appeal within the meaning of Article 27 and therefore

should be treated as having suspensive effect. The second is that even if a stay is granted on the transfer decision in these judicial review proceedings, that must be treated as stopping the six month clock under Article 29(2) until the determination of the judicial review proceedings. For the reasons I set out below, I consider that neither of these arguments are correct.

35. The resolution of these questions lies in the wording of Article 27, Article 29 and the terms of the 2018 Regulations. Article 27(1) provides as follows:

> *"The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal."*

36. Article 27(3) is important. It provides that, for the purposes of appeals against or reviews of, transfer decisions, Member States shall provide in their national law for three different alternative options. The first of these is set out at Article 27(3)(a) as follows:

> *"The appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review …*"

37. Ireland has chosen that option. The 2018 Regulations provide at Regulation 6 for an appeal against a transfer decision. Regulation 6(1) clearly identifies the body to whom the appeal is brought as follows:

> *"An applicant may, in accordance with this Regulation, appeal to the Tribunal, in fact and in law, against a transfer decision."*

38. The Tribunal is defined in Regulation 2 as the IPAT. Regulation 8 is headed up "*Suspension of implementation of transfer decision pending outcome of appeal*". Regulation 8(1) provides as follows:

> *"An applicant who appeals under Regulation 6 shall, subject to paragraph (2) be entitled to remain in the State pending the outcome of the appeal*."

39. One can see from the wording of Regulation 8(1) that Ireland has opted for the option identified in Article 27(3)(a) in giving effect to Dublin III. This suspensive effect is in turn recognised by Article 29(3) which permits the six month time limit to re-commence only from final decision on the appeal or review where there is a suspensive effect under Article 27(3). An applicant therefore benefits from an automatic suspension of the transfer decision made at first instance until the outcome of the appeal. The corollary of this is that once the appeal is determined by the Tribunal, Article 29(1) makes it explicit that time starts to run again, providing as follows:

> *"1. The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible 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 by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).*

40. As noted above, Article 29(2) provides for the consequences of not transferring within the six month time limit, providing that the Member State responsible shall be relieved of its obligations to take back the person concerned. Article 29(3) provides that if a person has been transferred erroneously or a decision to transfer is overturned, the Member State shall accept the person back.

41. Read together, these provisions make it clear that the Member State must transfer within six months of the final decision on an appeal or review where there is suspensive effect in accordance with Article 27(3). That appeal or review in Irish law is the IPAT decision.

42. No such suspensive effect, and consequent stopping of the six month clock, is given to a decision challenged in judicial review proceedings. The appeal or review referred to in Article 27(3)(a) is clearly that identified in Regulation 6 of the 2018 Regulations i.e. an appeal to the IPAT. Indeed, the appeal is described at Regulation 6 as being an appeal "*in fact and in law*", precisely as is required by Article 27 under the heading of "Remedies". Had there had been no appeal, the six months would have run from the decision by France to accept the applicant of 10 October 2022. Because the applicant enjoyed the remedy of an appeal as prescribed by Article 27, Article 29(1) dictates that the six months runs from "*the final decision on an appeal or review"* given suspensive effect, i.e., the decision of the IPAT of 20 September 2023.

43. In those circumstances, I take the view that the within judicial review proceedings do not constitute a review within the meaning of Article 29(1) of Dublin III because Ireland has already identified the body that carries out the appeal/review referred to in Article 27 i.e., the IPAT. Only that appeal/review enjoys automatic suspensive effect under Article 27.

44. Turning to the applicant's second point, it is argued that if a stay is imposed on the decision of the IPAT in these proceedings, there is no final decision within the meaning of Article 29(1) and therefore the six month clock does not begin to run. To that end, the applicant has asked that a stay be imposed on the decision of the IPAT. Where an applicant seeks an Order of *certiorari*, Order 84, Rule 20(7) of the Rules of the Superior Courts provides that the Court may make an order "*staying the proceedings, order or decision to which the application relates until the determination of the application for judicial review or until the Court otherwise orders*".

45. Assuming I stayed the decision of the IPAT, would that mean there was no "*final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3)*" with the consequence that the six month period would not commence? In my view, whether one construes Articles 27 and 29 literally or purposively, the answer must be no. The Dublin III Regulation explicitly provides for suspensive effect of the take back decision only up until the appeal/review is determined. That is the stay imposed by EU law. To treat a domestic stay on the IPAT decision as meaning there is no final decision on the appeal within the meaning of Article 29(1) would be to ignore the plain wording of Article 27(3) and Article 29(1). It is quite clear from those provisions, read together, that the purpose of them is to provide for a suspension of the transfer decision until the appeal/review that operates to suspend the transfer is determined. At that stage a new six month period commences within which the person must be returned. It is the combination of Article 27 and 29 that persuades me that, even if a national court suspends that final decision pending

a second review, the final decision for the purposes of Article 29(1) is the decision taken following the appeal or review referred to in Article 27.

46. I should emphasise that Articles 27 and 29 do not remove the entitlement of a national court to impose a new and distinct stay on an appeal/review decision if there is a further challenge at national level following on from the appeal provided for under Article 27; but that is solely a matter of domestic law, and does not alter the fact that the Member State requested to take back a person is entitled to treat the six month period as running from the date identified in Article 29(1). As noted by Advocate General Pikamäe in his Opinion in *AHY*, there is no obligation under the Charter to provide for a second review, such as judicial review in this case.

47. As I have set out above, the purpose of the Dublin III Regulation is to put in place a simple and prompt system for transfers where a person has, *inter alia*, sought and been refused international protection in another Member State. The importance of time limits in that system may be seen by the multiple provisions of the Dublin III Regulation that specify that a Member State will lose their right to transfer back, or indeed will be treated as having accepted a person by default, if steps are not taken within a particular period. The Member States have carefully negotiated the rules in relation to transfers and Dublin III reflects that agreement.

48. Member States have also recognised the importance of vindicating the right to an effective remedy, as recognised in Article 47 of the Charter, by providing for a suspension of the time limits while an appeal or review is brought. The reference to "final" in Article 29(1) must be read as the giving of a final decision by the IPAT. The fact that a national court can stay that decision as a matter of

domestic law in the context of what might be described as a second review does not mean that the IPAT decision should be treated as anything other than final. In the scheme established by Dublin III, it is a final decision for the purposes of the recommencement of the time limits.

49. I am reinforced in my conclusions by the views of Advocate General Pikamäe in *AHY* relied upon by the respondents. In the course of considering whether judicial review proceedings of a decision not to exercise the Article 17 discretion could be said to suspend the transfer decision, he concluded that the question of whether a challenge by way of judicial review under Irish law has suspensive effect is a matter exclusively of domestic law. He then turned to the time limits in Article 29(1) of Dublin III, observing at paragraph 101:

> *"As I have demonstrated above, Article 47 of the Charter does not require Member States to grant suspensive effect to an appeal brought under national law, such as the challenge by way of judicial review at issue. It follows logically from this that the six-month period within which to transfer the applicant for international protection starts to run, in the case in the main proceedings, from the date on which an appeal brought against a transfer decision is dismissed."*

50. Accordingly, I consider that as a matter of EU law, the six months run from the decision of the IPAT, including where that decision is challenged in judicial review proceedings and irrespective of whether a stay is granted on the IPAT decision pending the outcome of those proceedings.

Balance of Justice

51. Returning now to the application for an injunction restraining deportation/stay on the IPAT decision, I will consider the application having regard to the

principles identified in the test set out in *Okunade v Minister for Justice, Equality and Law Reform* [2012] 3 IR 152. Those principles require that the Court consider whether the applicant has established an arguable case. Here, the respondents sensibly accept that, given that leave was granted on 23 October on the arguable grounds threshold, the applicant must be taken to have met the arguability test. Considerable time was spent by counsel for the applicant at the hearing going through the grounds of challenge. But I am not concerned with the substance of the grounds of challenge here. It is true that in *Okunade*, Clarke J. said that in certain instances it may be necessary to consider the strength of the arguments. In my view this is not such a case, given my conclusions on the balance of justice as set out below. I will not therefore consider the procedural issue raised i.e., whether the Article 5 interview took place at the correct time or not, save to observe that Article 5(3) of the Dublin III Regulation only requires the interview to take place before the decision to transfer is made. Here the interview did take place before the decision to transfer, although not before Ireland requested France to accept the applicant, and France accepted the transfer request made by Ireland.

52. A separate argument is made that the fundamental rights of the applicant will be affected if the transfer goes ahead. A similar argument is made in support of the injunction application, and I deal with that when considering the balance of justice issues.

53. When considering the balance of justice, I must bear in mind the observations of Clarke J. in *Okunade* (para. 9.30) as follows:

> *"The entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision-*

making or action taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases."

54. Further on at para. 9.30 he observes as follows:

"An order or measure which is at least prima facie valid (even if arguable grounds are put forward for suggesting invalidity) should command respect such that appropriate weight needs to be given to its immediate and regular implementation in assessing the balance of convenience".

55. In short, the arguments made by the applicant in favour of an injunction are the following: that he is at risk of refoulement if returned to France; that his conditions and treatment (including medical treatment) in France will be inadequate; and that there is a threat to his mental health given the trauma he experienced in France and his fears of being returned to Georgia. In particular,

he relies upon the conclusion of Dr. Giller that he is at a high risk of suicide if he is returned to France.

56. The respondents argue there is a very significant detriment to them if an injunction or stay is granted. First, the six month time period will not stop running if an injunction/stay is granted. I accept that proposition for the reasons set out earlier in this judgment. Second, given the near certainty that the proceedings (including any appeal) will not be heard and determined by 19/20 February 2024 i.e., the date the six months runs out, where a Statement of Opposition has not even been filed yet, the respondents would lose the right to avail of the Dublin III Regulation under Article 29(3). On the other hand, they point out that there is no impediment to the proceedings going ahead if he is transferred. If the applicant establishes that the take back decision was unlawful, he is entitled to return to Ireland under Article 29(3) of the Dublin III Regulation. In relation to the suitability of France, they note that CJEU case law establishes that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR, and that no exceptional circumstances have been identified to warrant an injunction.

Discussion and Decision

57. Dealing first with the refoulement argument, the applicant cannot invoke any concerns about refoulement as a basis for challenging the transfer decision. This is made quite clear by the very recent decision in *CZA* that post-dates the hearing in this matter and was identified by both parties in their written submissions delivered subsequent to the hearing. In answer to the fourth question posed, the CJEU ruled as follows:

> **“** *Article 3(1) and the second subparagraph of Article 3(2) of Regulation No 604/2013, read in conjunction with Article 27 of that regulation and with Articles 4, 19 and 47 of the Charter of Fundamental Rights, must be interpreted as meaning that the court or tribunal of the requesting Member State, hearing an action challenging a transfer decision, cannot examine whether there is, in the requested Member State, a risk of infringement of the principle of non-refoulement to which the applicant for international protection would be exposed during his or her transfer to that Member State or thereafter where that court or tribunal does not find that there are, in the requested Member State, systemic flaws in the asylum procedure and in the reception conditions for applicants for international protection. Differences of opinion between the authorities and courts in the requesting Member State, on the one hand, and those of the requested Member State, on the other hand, as regards the interpretation of the material conditions for international protection do not establish the existence of systemic deficiencies.”*

58. The CJEU referred to the mutual trust between the Member States that common values will be recognised, and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, including Articles 1 and 4 of the Charter, including in the area of freedom, security and justice, and notes that the principle of mutual trust requires Member States, save in exceptional circumstances, to consider all the other Member States to be complying with the fundamental rights recognised by EU law. It observed as follows:

> *132 Accordingly, in the context of the Common European Asylum System, it must be presumed that the treatment of applicants for international protection in all Member States complies with the requirements of the Charter, the Convention relating to the Status of Refugees signed in Geneva on 28 July 1951 and the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ... and that the prohibition of direct and indirect refoulement, as expressly laid down in Article 9 of the 'Procedures' Directive, is complied with in each one of those States.*
>
> *133 That interpretation is the only one compatible with the aims of the Dublin III Regulation, which seeks, inter alia, to establish a clear and effective method for determining the Member State responsible and to prevent secondary movements of asylum seekers between Member States ... Those objectives preclude the court examining the transfer decision from carrying out a substantive assessment of the risk of refoulement in the event of return….*
>
> *134 That excludes any reliance by the applicant on refoulement arguments given that no evidence has been presented of any systemic deficiencies in France and given that it is regarded as a safe country.*

59. Turning to the exceptional circumstances that might justify a departure from the principles identified above, the applicant seeks to rely upon the decision of the CJEU in Case C-578/16 *CK v Republika Slovenija* (ECLI:EU:C:2017:127), arguing that the Minister failed to engage with the medical evidence proffered

by the applicant. The approach identified in that judgment is reiterated in *CZA* as follows:

> *"Furthermore, in the judgment of 16 February 2017, C.K. and Others (C-578/16 PPU, EU:C:2017:127), the Court held, in essence, that Article 4 of the Charter must be interpreted as meaning that, even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, that provision may be relied on where the possibility cannot be excluded that, in a particular case, the transfer of an asylum seeker within the framework of the Dublin III Regulation might entail a real and proven risk that that person will, as a result, be subjected to inhuman or degrading treatment within the meaning of that article."*
>
> *139 However, regard must be had to the fact that, as is apparent from paragraph 96 of that judgment, in the case which gave rise to it, the real and proven risk that the transfer of the person concerned would expose him to inhuman and degrading treatment was linked to the risk of a significant and permanent deterioration in the state of health of that person, in so far as he had a particularly serious underlying mental and physical condition. Subject to verification by the referring courts in Cases C-254/21, C-297/21 and C-315/21, none of the applicants in those cases is in a comparable personal situation.*

60. Further, in *N.S. v. Home Secretary* Joined Cases C-411/10 and C-493/10 the Grand Chamber of the CJEU observed at paragraph 80 that it must be assumed

that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR.

61. That passage in *CK* cited above refers to the substantive evaluation by a court as to whether a transfer decision should be upheld whereas here, I am considering the grant of an injunction. Nonetheless, the considerations identified above are ones that I should bear in mind. In my view, the evidence identified by the applicant does not establish that being transferred back to France would expose him to inhuman and degrading treatment linked to a significant and permanent deterioration in his health by reference to a particularly serious underlying mental and physical condition.

62. The IPAT decision records at paragraph 4.22 that the Country of Origin information does not disclose information that provides substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment in France within the meaning of Article 4 of the Charter and that the applicant has not rebutted the presumption that the treatment of the applicant by the French authorities will not comply with the Charter. No additional evidence has been put before this Court by the applicant in this injunction application.

63. The applicant relies heavily on the report from Dr. Giller as establishing exceptional grounds that should weigh heavily in the balance of justice. However, that report must be considered in the context of all available medical evidence. Neither Dr. Giller in her report, nor the applicant in any of the material submitted, has identified any long standing psychiatric history. Dr. Giller identifies the applicant as suffering from complex PTSD and generalised anxiety disorder due to his fear of being returned to Georgia. The applicant is

stated not to be on any medication and has not been seen by a GP or psychiatrist in relation to this mental health. The report was provided after two meetings with the applicant. Dr. Giller identifies that the applicant is not currently displaying severe suicidal ideation. Her report does not identify that a return to Paris risks a permanent deterioration in his mental health. There is no evidence that the medical services in France will be unable to address the risk of suicide that she considers will arise should he be returned to France.

64. Moreover, there are some inconsistencies in the applicant's evidence relating to his experiences in France. The Statement of Grounds refers to the submission made to the IPO by his solicitor that he had been detained and beaten by the individuals from whom he had fled from Georgia, that his room was broken into, that people were waiting for him, and he feared for his life. The decision of the IPO refers to the detention of the applicant as does the decision of the IPAT. However, in his account to Dr. Giller, and the affidavits before this Court, no reference is made to a detention or beating. No details are given as to the identity of the men, or what he understood their intentions to be.

65. In relation to his concerns about the medical facilities in France, the IPAT decision records that before the Tribunal he argued that he suffered from haemorrhoids and he did not receive medical treatment for same in France and believed it unlikely he will obtain satisfactory treatment. In my view, this does not approach the kind of likely prejudice he would be required to show.

66. Counsel for the applicant relied upon the decision of Ferriter J. in *AHY*, where an injunction was granted on the basis that the applicant had tendered medical evidence which suggested he was suffering from suicidal ideation and that if returned to Sweden he would be at serious risk of taking his life. Dr. Giller

provided the report for the applicant in *AHY*, just as she has done in the instant case. However, there is a point of distinction as the applicant in this case is not currently displaying suicidal ideation.

67. Moreover, the medical evidence was not the only factor that influenced the decision to grant an injunction in *AHY*. Ferriter J. also referred to other medical evidence tendered on his behalf, as well as the fact that part of the applicant's case was that he was entitled as of right to remain in the State pending the determination of this judicial review challenge to the Article 17 decision. No such right is contended for in these proceedings, where Article 17 is not at issue. Ferriter J. also considered it was relevant to the balance of justice that the applicant has raised issues of general importance as to the proper interaction between the provisions of articles 17, 27 and 29 of the Dublin III Regulation. Again, that is not the situation here.

68. Moreover, the decision in *CZA*, with its emphasis upon the importance of mutual trust as between Member States, including the recognition that national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, including Articles 1 and 4 and by the ECHR, had not been handed down when the decision in *AHY* was reached.

69. The orderly implementation of a system established by law is, in the circumstances of this case, highly relevant to the balance of justice. The take back scheme has been established by the Dublin III Regulation. The Preamble to the Regulation identifies that it seeks to deal with the correct country in which an applicant should be processed in an orderly and rapid manner. A decision has been made by the IPO and appealed to the IPAT. In both instances, the applicant has had an opportunity to make submissions and has been legally represented.

In both cases the applicant has been unsuccessful. The applicant has identified arguable grounds for judicial review, but the decision of the IPAT is *prima facie* valid despite the challenge that has been mounted. As per *Okunade*, that decision should command respect.

70. Moreover, the decision of the IPAT is part of an integrated system of regulation of asylum seekers, and it seems to me that all due weight needs to be accorded to allowing the systems and processes to operate in an orderly fashion, particularly in circumstances where that system has been carefully worked out between the Member States in their adoption of the Dublin III Regulation.

71. In summary, there is an irrevocable prejudice to the respondents if I grant the injunction sought because the six months will very likely elapse before the case is determined and at that stage the possibility of return to France is at an end. This means the case becomes moot. More significantly, it means the scheme put in place by Dublin III is set at naught because the applicant will no longer be subject to it by dint of the elapse of the six month period.

72. On the other hand, the applicant can be returned if it transpires that the decision was incorrect as identified under Article 29(3) of Dublin III. The applicant does not need to be present in Ireland for the judicial review to continue and to be concluded. Further, the applicant is being returned to another EU Member State which must be treated as a safe country. There are no systemic concerns about France. He cannot rely on concerns about refoulement as the basis for an injunction as that is a matter for France.

73. For the reasons I identify above, I do not believe the applicant has put forward evidence that he is likely to suffer inhuman and degrading treatment due to a significant and permanent deterioration in the state of his health or of his person.

There is undoubtedly a risk to him in refusing the injunction based on Dr. Giller's report. Nonetheless, the presence of that risk is not in my view so overwhelming as to outweigh the very strong arguments I have identified above for refusing an injunction/stay, in particular the integrity of the Dublin III regime.

74. Taking all factors into consideration, I conclude that the balance of justice favours a refusal of the application for an injunction and/or a stay on the decision to transfer the applicant.