THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 88

RECORD NO. 2024/140JR

BETWEEN

PZ

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 on 31 January 2024

Introduction

1. The applicant is a 31 year old Somalian national. On 26 August 2022 he arrived in the State and made an application for international protection on 29 August 2022. He averred that he sought protection on the basis that he was fleeing Al Shabbab who killed his father and two brothers. A EURODAC search on 29 August 2022 resulted in a category 1 hit with France (application on 7 October 2019). Category 1 hits also emerged with Germany (26 June 2014) and Sweden (18 December 2012). It appears he was 4 years in Germany and was refused international protection. He also made an application in France and was refused international protection there.

2. During September 2022, the International Protection Office (the "IPO") made take back requests to Sweden and, thereafter Germany, which were both rejected. On 28 September 2022 the IPO made a take back request to France, which was accepted on

12 October 2022. The applicant was informed on 5 December 2022 that France was taking responsibility for his claim. On 19 December 2022 the applicant's solicitors submitted information to the IPO detailing the applicant's experience of homelessness and lack of safety in France. It was further detailed that he had been stabbed in Somalia and required hospital treatment. On 31 January 2023 the applicant was issued with notice that his application was being transferred to France. He appealed this decision to the International Protection Appeals Tribunal on 7 February 2023. At an oral hearing on 14 April 2023, the IPAT found that the country of origin information did not provide any information which would support a risk of degrading and inhuman treatment in France and affirmed the transfer decision.

3. The core of the applicant's complaint at that stage was that he became homeless in Paris and was living on the streets and was robbed in the La Chapelle area of Paris, as the area was full of drugs and criminals. He identified poor reception conditions for asylum seekers, arguing that this raises a risk of harm under Article 4 of the Charter and also alleges private life rights under Article 7 Charter of Fundamental Rights of the European Union and Article 8 of the European Convention on Human Rights. Those arguments were dealt with by IPAT which found that the country of origin information indicated France was a safe country.
4. On 22 September 2023, the applicant filed a statement to ground an application for judicial review in relation to the decision of IPAT dated 22 August 2023 upholding the decision to transfer the applicant's protection claim to France as well as challenging the deportation Order.
5. An application for an injunction/stay restraining his deportation was sought in late December 2023 and I gave an ex tempore ruling on 21 December holding that the applicant was not entitled to an injunction restraining his deportation. I considered the

detriment to the respondent, in particular the fact that they would lose the right to transfer him under the regime established by the Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 (the "Dublin III Regulation"). On the other hand, I considered the detriment to the applicant, including the medical evidence in relation to his return to France. Applying the test identified in the decision in *Okunade v Minister for Justice & Ors* [2012] IESC 49 I held the balance of convenience was in favour of refusing the injunction/stay. Importantly, there was no reference in those proceedings to an extant application under Article 17, or to his awaiting a decision in relation to Article 17.

6. On Friday 26 January those judicial review proceedings were withdrawn and a costs Order was made against the applicant.

Application for an injunction/stay

7. On Monday 29 January I was told by counsel that new proceedings had been issued and was asked to hear an injunction application in those new proceedings the following day, i.e. 30 January, on the basis that the applicant had been told to report to the airport at 6.30am on Thursday 1 February and that therefore it was expected that he would be deported on that day pursuant to the deportation Order that is in existence. I agreed to hear the application and directed that the respondent be put on notice of the injunction application. The application went ahead yesterday. The respondent appeared and indicated that it was opposing the application, despite having had less than 24 hours to prepare for same and having had no opportunity to put in legal submissions or an affidavit.

Arguments of the applicant

8. The applicant focused upon the fact that no Article 17 decision had been made, that an application for Article 17 relief had been made in December 2022, that he had been

waiting ever since, that he had made additional submissions on his Article 17 application in January 2024 and that he could not be deported while his Article 17 application was pending as the arguments made had not yet been determined by the Minister and must be determined by her. He relied heavily on the pending reference in *AHY v The Minister for Justice* [2022] IEHC 198 and argued that, since the CJEU may decide in that case that judicial review proceedings challenging a refusal to grant Article 17 relief may have suspensive effect under Article 29 of the Dublin III Regulation, he should not be deported pending the determination of that reference. He also argues that the six-month period identified under Article 29 has not started running given that no valid transfer decision has been made since the Article 17 decision must be made at the same time as the transfer decision. Counsel accepted that the latter argument is dependent on an application for a decision under Article 17 being sought by an applicant prior to the transfer decision. He also argued the failure to provide clarity on the Article 17 process has led to confusion amongst applicants and pointed to the lack of any application process or form. He argued that the last minute nature of the application had been caused by the State's delay in adjudicating on an application that was made on 19 December 2022.

Arguments of the respondent

9. The respondent says that the application for Article 17 relief was only made on 24 January 2024 and that the letter of 19 December 2022 was not an Article 17 application. It is said that the matters identified in the injunction application in December 2023 in relation to risks to his life and health that were rejected at that stage are relied upon again, and that no new grounds justifying a last minute application have been identified. It is said that there is prejudice as the Minister will lose the right altogether to send him back even if the CJEU follows the Advocate General in *AHY* and finds that a challenge

to an Article 17 refusal does not have suspensory effect. It is said that the eleventh hour nature of this application is highly relevant to the balance of justice and that the applicant is abusing the system of international protection. It is also said it will undermine the Dublin III Regulation if the Minister is not entitled to send back persons who have already made and been refused applications for international protection in other Member States. It is emphasised that the applicant in these proceedings has made two such applications and been refused in France and Germany. It is argued that, if it turns out that he was wrongly transferred after the decision in *AHY*, the applicant can be returned.

When was the application for relief under Article 17 made?

10. Article 17 provides that by way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in the Regulation.

11. The applicant refers to the letter of 5 December 2022 that he received from the IPO informing him that France had accepted responsibility for his intentional protection application and that he could submit any information including humanitarian grounds he considered relevant within 10 days to the IPO. The applicant argues that this was an invitation to submit an Article 17 application.

12. In the reply his solicitor sent of 19 December 2022, there was no reference to Article 17 or a request that the Minister consider his application under Article 17. Rather, he referred to the conditions he had faced in France and the conditions he would face if he returned. It was argued that as a matter of EU law, following the decision of the CJEU in Case C-578/16 *CK v Republika Slovenija* (ECLI:EU:C:2017:127), the transfer should be cancelled. Moreover, it was argued that a transfer would be in breach of the

applicant's rights under Article 3 and Article 8 of ECHR and Articles 4 and 7 of the Charter. Reference was made to the Court of Appeal and the Supreme Court decisions in *NVU v The Refugee Appeals Tribunal* [2019] IECA 183 and [2020] IESC 46.

13. There is no reference to Article 17. Rather the application is based on legal grounds. It is made to the IPO, who do not have responsibility for Article 17 decisions as per the decision of the Supreme Court in *NVU*. There was no ambiguity about the law in this respect at the time that letter was written.

14. Importantly, in the judicial review that was brought after IPAT refused his appeal, there was no reference to Article 17 grounds. The applicant is now seeking an Order of *mandamus* directing the Minister to make a decision – but that relief could have been sought in the judicial proceedings and was not. That has two consequences – it tends to undermine the applicant's claim that he believed he had made an Article 17 request in 2022 and it undermines his good faith since, if he did so believe, he ought to have litigated it at the same time as he challenged the IPAT decision, rather than keeping it in his back pocket and bringing it out at the eleventh hour i.e. two days before he is to be deported.

15. It is true that in its decision IPAT said the applicant's arguments raised issues that require the application of Article 17. But that does not mean the applicant had made an Article 17 application to the Minister. It simply means the arguments he had made before IPAT were not ones upon which they could adjudicate.

16. The application made on 24 January 2024 is headed up "pre-action letter for judicial review" and is addressed to the Minster. It describes its contents as "Submissions further to the application under Article 17". The Minister is requested to make a "final determination" pursuant to his Article 17 application for discretionary relief. But I have already concluded that the letter of 19 December 2022 was not an application for the

Minister to exercise her Article 17 decision. The only way I can characterise the letter of 24 January 2024 is as a new application for Article 17 relief, when the applicant is at the very end of the transfer process, having received decisions from both the IPO and the IPAT in that respect.

17. In summary, the applicant came to Ireland in August 2022, obtained a decision that he should be transferred to France where his application for international protection had been refused, appealed that, and received an IPAT decision in 22 August 2023 upholding the transfer decision. He was the subject of a decision to deport him. He judicially reviewed the IPAT decision and the deportation Order and sought an injunction/stay seeking to prevent his removal. I refused that in December 2023. It was only after all those steps were taken that he made his application for the Article 17 discretion to be exercised on 24 January 2024.

Substantive proceedings

18. Because the application has been made so quickly, I am not dealing with the leave application at this stage but only the injunction application. But it is clear from *Okunade* paragraph 86 that the fair or arguable issue to be tried leg of the *Campus Oil* test must also be met in the context of judicial review applications.

19. Here, no Article 17 refusal exists. There is no challenge to a decision. There is an application for *mandamus* to compel the Minister for Justice to make a determination under Article 17. But I cannot characterise that argument as fair or arguable given that on the basis of my finding above, the application was only made on 24 January 2024, i.e., 5 days before the proceedings were issued on 29 January 2024. There is also an attempt to challenge the implementation of the transfer decision on the basis that the transfer decision was *ultra vires* the Dublin III Regulation. This is a collateral attack given that the transfer decision was challenged in the previous judicial review

proceedings and those proceedings were withdrawn. Again, that argument would not meet the fair issue to be tried standard.

20. The other reliefs are hypothetical as they are declarations in respect of the correct way to make Article 17 decisions where no such decision has been made in the instant case, and the process has only just started. The applicant is seeking to attack the decision not to give him a personal interview and the identity of the person whom he expects to make the decision. But these grounds are exceptionally weak given that the application was made on 24 January 2024 and therefore there is neither a decision to attack or even a flawed process. It is well established that courts do not decide on hypothetical or abstract issues.

21. In my view the applicant has failed to establish that in the particular circumstances of this case, he has established an arguable case and for that reason alone he is not entitled to the relief sought.

Balance of Justice

22. However, for the sake of completeness I will consider some of the balance of justice arguments. Against the applicant are the lateness of the application; the failure to explain the delay; the prejudice to the respondent in that, on one view, it will lose the right to return the applicant if the respondent's interpretation of Article 29 of Dublin III is correct and applications for Article 17 relief do not have suspensory effect under Article 27/29 of Dublin III; the fact that the applicant is entitled to return to Ireland if it turns out he ought not have been deported; and the fact that no new evidence of harm or ill treatment has been adduced in these proceedings. I refer to my judgment in *RG v IPAT & Ors* [2023] IEHC 742 where some of those factors were discussed in greater detail.

23. In favour of the application is the fact that there is an extant reference to the CJEU in the case of *AHY*, and the possibility that the applicant may be correct either that (a) a transfer decision is not final until a decision under Article 17 has been made and finally adjudicated upon by way of judicial review and that therefore there is no prejudice to the respondent as the six month time limit has not started to run or (b) judicial review of an Article 17 decision is entitled to suspensory effect under the Dublin III Regulation. It is also the case that he has an extant Article 17 application (albeit one that is less than one week old) that has not been determined.
24. When I balance those factors, it seems to me that the fact that the applicant could have made this application in 2022 but did not do so must weigh heavily, as well as the fact that there is no challenge to a refusal under Article 17. This is unlike the situation in *Hurie v Minister for Justice* (ex tempore decision of 19 December 2023) where a challenge had been made by way of judicial review to a refusal of relief under Article 17 and I granted an injunction to restrain deportation. I am also influenced by the fact that if the respondent is correct in its interpretation of the Dublin Regulation (the same interpretation as that adopted by the Advocate General in *AHY*) it will lose the right to return this applicant to France under the Dublin Convention, whereas if the applicant turns out to be right following the decision in *AHY*, he will be entitled to be returned to Ireland.

Conclusion

25. In all those circumstances, I refuse the application for an injunction given that the applicant has not made out an arguable case and because the balance of justice favours the refusal of the application for injunctive relief or a stay in the particular circumstances of this case.