THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 120 J.R.]

BETWEEN

U.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 24th day of October, 2017

Issues

1. This judgment relates to the remaining issues outstanding following the delivery of a judgment on 26th June 2017 in respect of the issues raised concerning Article 17 of Dublin III and the need, if any, for the second named respondent to publish policies as to the exercise of Article 17 discretion.

2. The applicants had initially filed a statement of grounds when seeking leave. This statement of grounds was subsequently amended. A further amendment was made to that. The statement of grounds considered by the Court is the second amended statement of grounds of the applicant bearing date the 8th May 2017. The reason proffered in respect of this final statement of grounds was because of the content of the affidavit of Brian Merriman on behalf of the respondent sworn on 28th April 2017 when the Minister asserted that the Article 17 discretion was vested in the Minister and not in IPAT or its predecessor. The applicants consider this an about turn on the part of the Minister and hence the statement of grounds required amendments.

3. The relief and grounds incorporated in the second amended statement of grounds relative to the outstanding issues are:

> "(a) At para. (d) of the statement of grounds the nature of the reliefs sought is set out. At para. 2 thereof a declaration is sought that the impugned decision is wrong in law and at para. 8 thereof a declaration is sought that the first named respondent failed, contrary to Article 8 of the European Convention on Human Rights, to have any proper regard to the applicants' right to family and private life in Ireland.
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> (b) The grounds supporting the declarations sought aforesaid are set out at para. (e) of the statement of grounds. Ground 8 suggests that Article 8 rights were disregarded as the first named respondent failed to consider the first named applicants account of having suffered from domestic violence, failed to have any regard to the medical report furnished and erred in failing to consider the minor applicants accounts of fear of harm in the United Kingdom from their father. At ground 9 it is asserted that in finding that the applicants should be returned to United Kingdom the first named respondent had no proper regard to the best interests of the minor children under Article 6 (1) and 6 (3) of Dublin III.

4. When pressed on the nature of the private life and family life rights in Ireland asserted, the applicants initially indicated that there were no family rights raised, however subsequently tempered this to suggest that no family unity issues arose. As to private life rights it was suggested that three children attend school in Ireland and that they would suffer a disruption in this regards.

Submissions by the applicants to the first named respondent by way of appeal

5. Following the initial application and interview ORAC made a decision that the applicant should be transferred to the United Kingdom for the purposes of assessment of their asylum application. This decision was appealed on behalf of the applicant by way of an appeal document bearing date 24th May 2016 wherein an oral hearing was also sought. That oral hearing was heard on 2nd November 2016.

6. Three grounds were set out in a notice of appeal:

> (a) Ground no.1 sets out the background and history of the applicant. The applicant suffered domestic violence from her husband and his family initially in Pakistan. The applicant subsequently suffered domestic violence in the United Kingdom since she travelled there on a UK spousal visa from in or about the 7th May 2014, until she arrived in Ireland on 5th June 2015. Based on same it was indicated that the applicant's fear of returning to United Kingdom was because of a fear of deportation to Pakistan and further abuse from the first named applicant's husband's relatives. The first named applicant also expressed fear that if returned to the UK her husband would find them.
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> (b) Ground no.2 focuses on the potential fast track procedure in the United Kingdom and on this basis it is complained that ORAC ought to have considered whether a decision to transfer the applicant to the United Kingdom is appropriate or whether to apply Article 17 of Dublin III.
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> (c) Ground no. 3 asserts that the applicant is at extremely high risk of being deported to Pakistan from the United Kingdom and due to the risk of chain refoulement her transfer would be in breach of s. 5 of the Refugee Act 1996. The third ground raised was an effective plea for Article 17 (1) discretion.

The impugned decision of 24th January 2017

7. The decision records the background to the appeal and refers to the notice of appeal of 24th May 2016 together with subsequent country of origin information received on 27th October 2016 as to the legal uncertainty with regard to Brexit. In addition the decision records the receipt of a G.P. report dated 6th July 2016 and at para. 3.2 there is a brief but accurate synopsis of the report, save as

hereinafter mentioned.

8. At the hearing, the first named applicant gave evidence on behalf of all applicants and went through her background as aforesaid and as set forth in the judgment delivered herein on 26th June 2017. She recorded that her husband works in a takeaway in the UK and that he threatened to inform the police in March 2015 of her presence in order to have her sent back to Pakistan. The applicant did not advise the police in the United Kingdom of any issue as she has no confidence in police as her husband and his father were policemen in Pakistan. Her husband holds the family passports and he does not know that the family are in Ireland. In response to the suggestion that the UK had agreed to accept her back to their system, the applicant replied that:-

> "They will deport me and my children. I don't want to go back for my children's sake, especially my daughter".

9. When asked as to any specific concerns for her children, her fear was that they would be deported from the United Kingdom, her husband will know where they are and that he has all the documents.

10. Fear was also expressed concerning a possible deportation to Pakistan, however, as that is a matter for consideration in the Asylum application as opposed to a possible transfer under Dublin III, it is not relevant to this judgment and therefore, not recorded herein.

11. It is clear from the decision that the children attended school in Pakistan and that they also attended school in the United Kingdom (see para. 4.5 of the decision). The first named applicant reiterated her fear that if she goes back to the United Kingdom her husband will find them.

12. In para. 5.4 of the decision, it is recorded that was not submitted that there were systemic deficiencies in the UK as a basis to be applied to prevent a transfer. This finding has not been impugned at any stage.

13. At para 5.5 of the decision, it is recorded that the applicant's solicitors were not arguing that Article 3(2) applied but that the factors which could be taken into account for that Article could be applied when considering Article 17.

14. At para. 2.2 of the decision, it is recorded that the claim for asylum was made on 5th June 2015 and the dates of birth of the applicants are set out and this para. concludes with:-

> "by virtue of Articles 11 and 20.3, there appears a link to that of their mother."

13. At para. 5.2 of the decision, it is recorded that the best interests of the children is with their mother and there is no conflict between them. It is further recorded that the voice of the children was heard through the parents and submissions.

14. At para. 5.8 of the decision, it is stated that the details furnished by the applicant give rise to sympathy but do not establish a real risk of being subject to inhuman or degrading treatment if returned to the United Kingdom where they would be received with safeguards, and at para. 5.10 of the decision, it was indicated that it is for the Minister when transferring the applicants to address the medical concerns of the first named applicant.

Applicants submissions

15. The applicant was invited to explain how it would be possible to argue that the Tribunal erred in considering Article 8 rights in circumstances where same were not independently raised in the notice of appeal. The applicants argument in this regard is to the effect that the details provided within the notice of appeal including the Article 17 submissions were such that these details could ground an application under Article 8 of the European Convention on Human Rights and any failure on the part of the applicant's solicitors to mention Article 8 in those submissions should not be held against the applicants and that the applicants should receive a "bounce of the ball" in this regard. Assuming therefore that Article 8 rights were included in the notice of appeal the applicants argue that they were not dealt with and in fact it is argued that the Tribunal did not know it had jurisdiction to deal with Article 8 rights. It is further argued that on this basis the courts discretion should not be exercised in favour of allowing the decision to stand even if the court felt that the details furnished by the applicants concerning the Article 8 rights were insufficient to pass the necessary threshold in order to secure an entitlement of the applicant to remain in Ireland to process their asylum application. As, it is argued, otherwise the Court would be exercising the jurisdiction of the Tribunal and that would be an excess of judicial discretion.

16. The applicants further refer to the textbook of De Smith's *Judicial Review 7th Edition*, para. 18–047 and 18–048 to support the proposition that discretion of the court to do other than quash the relevant order where such excessive exercise of power is shown is very low and lower still where the claimant has succeeded in demonstrating a directly effective right under European Law given the general obligation on the court to provide effective protection.

17. It is clear that De Smith's is relying on Berkeley v. Secretary of State for the Environment Transport and the Regions and Another [2001] 2 AC 603 to support the proposition aforesaid and the author does note in a footnote that later cases make clear the mere existence of a European Community Union law right is not necessarily a bar on the exercise of the courts discretion. De Smith's does acknowledge that the court does have discretion in the sense of assessing "what it is fair and just to do in the particular case", however as aforesaid suggests that this is now potentially non existent in European Union Law matters.

18. The respondent counters that there is no European case law to date to support the proposition that Article 8 rights must be considered in or about a Dublin III transfer decision.

19. For the purpose of the Applicant's arguments only, in this case, it is clear that the height of their argument is the jurisprudence, at its best, from the applicant's point of view, are the UK Court of Appeal decisions in *R & Others v. The Secretary of State for the Home Department* [2016] NWCA Civ 166 and *R. v. Secretary of State for the Home Department* [2016] EWCA Civ 810 (cases which the respondent argues are not binding on this Court) where it was held that an especially compelling case under Article 8 would have to be demonstrated, and accordingly in the circumstances of the instant matter there would be no utility in returning the matter to the Tribunal for consideration as on the applicants own admission the height of the Article 8 rights sought to be protected is that of the children attending school in Ireland.

20. The respondent counters the UK CoA made such a finding in the absence of a reference to Europe, as a consequence the Respondent suggests the UK CoA decision should be treated as an outlier. For the reasons set out in this judgment I am satisfied I am in a position to determine the issues between the parties without either following or rejecting the UK CoA decisions.

21. In the matter of *M.E. v. Refugee Appeals Tribunal* [2017] IEHC 464 Mr. Conlon sought to raise in the judicial review proceedings

matters which were not raised before the relevant decision maker. In that case relying on the jurisprudence of:-

(a) *N.M (DRC) v. the Minister for Justice, Equality and Law Reform* [2016] IECA 217 at para. 52 and 53 thereof;

(b) *F (ISO) & Others. v. the Minister for Justice* [2010] IEHC 457 and in particular para. 10 thereof; and

(c) *Imoh v. Refugee Appeals Tribunal & Anor.* [2005] IEHC 220 it was held that the case law on point demonstrates that in judicial review of an administrative decision it is not appropriate to complain of an issue which has not been raised before the RAT and there is no lapse on the RATs part in not dealing with such an issue which has not been raised in its decision. In this regard the most salient jurisprudence is to be found in the *Imoh* matter where Clarke J. stated:

> "I find it hard to see how any appropriate criticism can be made of the RAT under this heading. Where, as here, the applicant chooses not to raise the issue in the notice of appeal or to refer to the matter at the appeal hearing I do not believe that there is any basis for suggesting that there was any inappropriate failure on the part of the RAT to deal with the matter in the course of its determination."

22. The applicants seek a "bounce of the ball" in respect of the submissions raised on the 24th May 2016 however the reality is that the applicants also had the benefit of an oral hearing on the 2nd November 2016 and an Article 8 argument was not presented at that time either. Para 5.5 of the decision demonstrates a recognition by the Applicants that a given set of circumstances might be the formulation for alternative reliefs which significantly dilutes any argument to the effect that the Applicants are entitled to be forgiven ('a bounce of the ball') for not mentioning Article 8 of the ECHR either in the Notice of Appeal or at oral hearing.

23. In addition I note in the matter *JMN v. Refugee Appeals Tribunal* [2017] IEHC 115 Humphreys J. was dealing with a somewhat similar type of argument. At para. 19 of the judgment it is recorded that there was a lack of birth certificate in respect of the applicant of which the Tribunal was aware however the Tribunal did not deal with the lack of birth certificate in addressing the issues because that was not the way in which the applicants claim was presented. In written submission to the court the Applicant was seeking leave to judicially review the relevant decision and it was indicated that the lack of birth certificate was a central or core issue of the case which Humphreys J. indicated involved a post hoc reconstruction of the basis of the claim as actually put which had been stated as based on perceived political opinion. Humphreys J. goes on at para. 19 to state:-

"19. In circumstances where the applicant did not make an issue of it, there was no obligation on the tribunal to engage in the sort of analysis that the applicant now complains about. For the applicant to put up a claim on a particular basis to the tribunal, have it rejected, and then complain to the court that a different basis was the central or core issue which the tribunal allegedly wrongly failed to address, is to engage in a heads-I-win, tails-you-lose form of gas lighting of the tribunal. No substantial grounds arise, or can arise, for such a spurious procedure. No decision could survive judicial review if such a process were permissible."

24. In *KP v. Minister for Justice, Equality and Law Reform* [2017] IEHC 95 Humphreys J. at para. 23 of his decision was dealing with the asserted narrow discretion of the court in or about refusing a judicial review and he states:-

"23. Mr. Whelan submits that "whatever discretion a court has is narrower when the court is dealing with matters of EU law given that the court is under a general obligation to provide effective protection". Reliance is placed on the House of Lords decision in *Berkeley v. Secretary of State for the Environment, Transport and the Regions and Another* [2001] 2 AC 603. However, the point in issue there was a substantially narrower one, namely that" 'the fact that a court is satisfied that an [Environmental Impact Assessment] would have made no difference to the outcome is not a sufficient reason for deciding, as a matter of discretion, not to quash the decision" (per Lord Hoffman at 613). But "later cases make clear that the mere existence of a European Community law right is not necessarily a bar on the exercise of the court's discretion" (Woolf, Jowell, Le Seur, Donnelly and Hare, De Smith's *Judicial Review , 7th ed.*, (London, 2013), p. 979 n. 123, citing *Brown v. Secretary of State for Transport, Local Government and the Regions* [2003] EWCA Civ 1170 ; *R. (Rockware Glass Ltd) v Chester City Council* [2006] EWCA Civ 992 ; *R. (Gavin) v. Haringey LBC* [2004] P.&C.R. 13)."

25. By virtue of the foregoing it does not appear to me that it would be appropriate to read into the applicant's appeal document of 24th May 2016 an argument based on Article 8 in the circumstances of the content of the appeal document and the failure on the part of the applicants to make any reference to Article 8 therein or indeed at the oral hearing.

26. However even assuming that I am incorrect in that regard and an Article 8 submission should be read into the applicant's appeal before the Tribunal (it is common case that the impugned decision does not deal with an Article 8 issue) nevertheless I am satisfied that I am entitled to exercise discretion in refusing any declaratory relief sought given that there is as yet no EU decision to suggest that Dublin III can be bypassed by virtue of Article 8 rights and the only jurisprudence upon which the applicant might rely is the aforesaid judgments from the UK Court of Appeal, which I do find persuasive, however a threshold of "an especially compelling case" was held to be necessary and the applicants are nowhere close to that threshold. The within Applicants' claim based upon the fact that the children attend school in Ireland or indeed on the basis of any other of the complaints made by the applicants (which in my view relate to the behaviour of the first named applicant's husband and his family) does not amount to "an especially compelling case".

27. The applicants suggest that the decision maker does not deal at all with the fear as expressed that if the applicants were returned the UK the first named applicant's husband would find them and/or they would effectively be chain refoulement to Pakistan. Insofar as the assertion of chain of refoulement is concerned the Applicants argued that citizens from Pakistan were more likely than others to be deported from the UK. This however does not amount to evidence that those deported from the UK would suffer a real risk of inhuman or degrading treatment on their return to Pakistan as the UK is a signatory to the Geneva Charter and European Convention on Human Rights this evidence would be necessary in order to rebut or replace the principle of mutual trust.

28. I am of the view that the express fear that if returned to the UK the first named applicant's husband would find them in circumstances where he works in a takeaway is sufficiently irrational and unsupported by any evidence whatsoever that it would be impossible to criticise the decision for not expressly dealing with this fear. In my view the decision at para. 5.8 of the decision did indicate that the applicants will be received as applicants for asylum in the UK with all appropriate safeguards so to that extent it does appear to me that the fears expressed on behalf of the applicants were intricately dealt with.

29. Insofar as the applicant argues that the best interest of the children should be a paramount consideration, in fact the respondent does not disagree with this but rather states that same should not be considered in isolation but rather the entirety of Dublin III should be reviewed including the recitals to the effect that it is a primary purpose of Dublin III that families would not be separated

and there is a duty of cooperation between Member States in this regard and therefore it is suggested that a rebuttable presumption arises that the interest of the children will be served in examining their case together with the parent of family member, as circumstances dictate. The respondent also points to the fact that there were no submissions in the appeal of the 24th May 2016 relative to the best interests of the children, no request was made that the children be interviewed, there is nothing to suggest that the best interest would not be served by staying with their mother, and no argument that the best interest of the children would be in jeopardy (save if discovered by the father).

30. The applicants argue that by finding that the applicant should be returned to the United Kingdom the first named respondent gave no proper regard for the best interest of the minor children under Article 6 as aforesaid. However the relevant decision does not support such a submission on behalf of the applicants in that:

> 1. At para. 2.2 of the decision it provides that the children's appeal is linked to the mother. There is no suggestion on behalf of the applicants that it should be otherwise;
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> 2. At para. 4.5 of the decision the Tribunal, having specifically asked the first named applicant as to any fears in respect of the children, recorded their concerns of a deportation order to Pakistan and that their father will know where they are;
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> 3. At para. 5.2 of the decision it is provided that the best interests of the children would be with their mother and that no conflict arises and that the voices of the children were heard to through their parents and submissions.

31. It appears therefore that the height of the applicants argument in respect of the best interests of the children is:

(a) the fact that they attend school in Ireland,

(b) they are fearful that their father will find them if returned to the United Kingdom, and

(c) the UK will deport them to Pakistan.

32. As aforesaid it is clear that the children attended school in Pakistan and again in the UK prior to attending school in Ireland therefore education is available both in the UK and in Pakistan. As to the fear of their father finding them on return to the United Kingdom this fear as aforesaid appears irrational and unsupported by any evidence. The possibility of being deported from the UK to Pakistan is dealt with at para. 26 hereof. In these circumstances, I do not accept the applicant's submission that the best interests of the children were not properly considered is well founded.

33. The applicant argues that the medical report tendered was rejected without reason however I am satisfied that this is not an accurate characterisation of the Tribunal decision. It is not the case that the Tribunal rejected the medical report which because of its brevity can conveniently be set out:-

"This lady attends this practice and suffers from depression and PTSD for which she is currently taking Sertraline 100mgs daily. Her symptoms include chronic sadness and bouts of tearfulness, low mood, lack of energy and drive, anxiety, lack of confidence and pessimistic outlook. She attends Mayo mental health services regularly."

34. No further medical document was submitted. The content of the report is set forth in para. 3.2 of the Tribunal decision and save that it omits reference to the fact that the first named applicant was attending Mayo mental health services regularly. However given the fact that no report has been received from the Mayo mental health services a decision could not possibly be validly impugned on this basis. Indeed at para. 5.7 of the decision it is noted that the first named applicant is currently receiving counselling, medication and family therapy for depression and PTSD and at para. 5.10 of the decision it is stated that it is for the Minister in transferring the applicants to address medical concerns.

35. The foregoing therefore demonstrates that the medical report was neither rejected nor ignored.

Conclusion

36. In light of the foregoing the applicants have not demonstrated that the decision of 24th January 2017 should be quashed or indeed declarations should be made in respect thereof in accordance with relief D2 and/or D8 of the second amended statement of grounds of the applicants either based on the asserted Article 8 rights or the assertion that the Tribunal failed to consider the best interests of the children. The relief is therefore refused.