An Chúirt Uachtarach

The Supreme Court

Clarke CJ
MacMenamin J
Dunne J
Charleton J
Finlay Geoghegan J

Supreme Court appeal number: S:AP:IE:2017:000111

[2019] IESC 032

Court of Appeal record number: 2016 no 446

[2017] IECA 179

High Court record number: 2015 no 433 JR

[2016] IEHC 469

Between

BS and RS

Applicants/Appellants

- and -

The Refugee Appeals Tribunal and the Minister for Justice and Equality and The Refugee Applications Commissioner

Respondents/Appellant

Judgment of Mr Justice Peter Charleton of Wednesday 22 May 2019

1. The applicants sought asylum in Ireland on 16 December 2014. The legislation referred to in this judgment has been largely replaced by the International Protection Act 2015. The relevant legislation for the purpose of this judgment is the Refugee Act 1996, along with the Dublin Convention (Implementation) Order 2000, SI 343 of 2000, which was, on the date that the transfer order was made, 19 May 2015, the operative national legislation for the transfer of an applicant for refugee status from Ireland to another country. This judgment gives reasons for concurrence with the principal judgment; that of Dunne J.

Implementing law

2. Naturally, the Dublin Convention Order was the first port of call for public servants working for the Office of the Refugee Applications Commissioner or for the Refugee Appeals Tribunal. This Order applies where an application has been made under section 8 of the Refugee Act 1996 for a declaration under section 17 of the Act. Article 6 of the Order delays any such transfer for a minimum period of five working days or for the entire duration of any appeal taken by an applicant. What this appeal has been about is the nature of the information that might be requested from another country which is party to the Dublin Regulation, now in its third iteration as Dublin III Regulation (EU) No 604/2013. Article 4(1) of the Order enables the Commissioner, and on appeal the Tribunal has equal powers, to "make or cause to be made such inquiries and, by notice in writing, request such information in relation to matters specified in the notice as is necessary or expedient for the purpose of making a determination" under Article 3 as to whether an applicant should "be transferred to a convention country for examination" as to whether an applicant qualifies for refugee status or should instead "be examined in the State."

3. There is no legislative restriction on what might be asked under the terms of the Order and nor is there any limit as to whether an enquiry might be made of one or more countries. The only boundary is set at not moving outside Dublin Regulation countries. While the schedules to the 2000 Order set out a notice of possible transfer, a notice of determination to transfer and a notice of appeal, legal formalism has not intruded into the nature of the information sought or the manner in which any query may be raised: nor should it. Common to those three documents is the necessity to recite the name of the applicant, to give reasons for a transfer and, as regards the notice of appeal, for the appellant to specify their own name and address, nationality and their temporary residence certificate number. Under the Refugee Act 1996 (Application Form) Regulations, SI 345 of 2000, an applicant seeking refugee status must fill out a prescribed form which states under their signature that they "apply for a declaration as a refugee in Ireland" and which requires them to specify: their family name and forename; their date of birth; their nationality; their country of birth; their address in their own country; the name of any spouse or partner and children; and their dates of birth. In this case, almost every such detail would be wrong through the applicants undermining their assertions as to who they were by providing a completely false name and address and by answering questions in the application form with misleading propositions. For instance, on their true identity becoming known in consequence of information being supplied by Great Britain, and on it emerging that they had obtained a visa for travel to

that country in Warsaw in Poland, it was alleged by the applicants that an agent had organised their itinerary and that they were never present in that city and had never applied for any such visa. Yet, their fingerprints are on the relevant visa application form.

4. Section 11B of the Refugee Act 1996, as inserted by section 7(f) of the Immigration Act 2003, proposes that in assessing the credibility of a claim that an applicant was persecuted in their country of origin, and consequently has fled to Ireland, regard be had to their possession or not of identity documents, the account given of travel to Ireland, and whether "manifestly false evidence" had been adduced in support of the asylum claim. In common with the principle, stated in, among other places, the United Nations Refugee Handbook, the process of application is in no way adversarial. As the Handbook provides, it is a two-stage fact-finding process: "Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained."; paragraph 29, United Nations Refugee Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV 1 Reedited, Geneva, January 1992, UNHCR 1979. This is a collaborative process designed to find out the truth. That requires good faith on both sides. It is never a question of the applicant being on trial or the State parties attempting to catch people out. What is involved is an enquiry into reality. That is a bipartisan process which requires Ireland to, for instance, keep abreast of information on the country of origin of applicants in relation to persecution of minorities and, where subsidiary protection is sought, as to whether civil turmoil reigns in the place of an ordered society. International protection is given on the basis of a collaborative process between the applicant and the examining authorities. In that regard, the duty to cooperate cast on an applicant by section 11C of the Refugee Act 1996, as inserted by section 7(f) of the Immigration Act 2003 is neither burdensome nor out of kilter with the State's international obligations. That legislation provides that it is the "duty of an applicant to co-operate in the investigation of his or her application and in the determination", as here, "of his or her appeal". Thus, an applicant has a duty to "furnish to the Commissioner or the Tribunal", depending on the level at which the enquiry is being conducted, "all information in his or her possession, control or procurement relevant to his or her application." Similarly, the United Nations Handbook provides at paragraph 205 that the applicant should do the following:

> (i) Tell the truth and assist the examiner to the full in establishing the facts of his case.
>
> (ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.
>
> (iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him.

5. Alien to such a collaborative process would be the application of manoeuvres designed to catch either party out. What, further, ought to be remembered in this context is that there is no exclusion of evidence in consequence of any accidental or unthinking illegality even in the context of a civil trial. Any such rule as to the exclusion of the "fruit of the poisonous tree", as Frankfurter J termed the products of illegal searches and seizures in *Nardone v United States* 308 US 338 (1939), applied only as a discipline against the law being broken in the investigation of crimes. The law, in any event, as to criminal trials has now moved on from the absolutist position first arrived at in *The People (DPP) v Kenny* [1990] 2 IR 110 whereby an unthinking error as to, for example, a name or address on a search warrant but an entry in good faith into the home of the accused would render an arrest there unlawful and the exclusion of any evidence as to anything found there. Under that rule, as it formerly existed, there was no balancing exercise as between the apparent innocence or triviality of the legal breach by the investigating authorities and the seriousness of the charge or the compelling nature of what was found. Thus, for a period of 25 years from 1990 to 2015 where there was a wrong house number on a search warrant and where the police were, for instance, investigating child pornography, an entry on foot of that warrant which discovered compelling evidence on computers seized at the accused's home would be concealed from the jury trying the case. That absolutist rule has now gone. Under the current law, a balance must be struck; *The People (Director of Public Prosecutions) v JC* [2017] 1 IR 417.

6. In *Kennedy v Law Society of Ireland (No 3)* [2002] 2 IR 458, an issue was raised as to the validity of an investigation before the Solicitors Disciplinary Tribunal and a plea for exclusion of evidence was consequently made should the investigation be ruled improper. While the exclusion of evidence resulting from an inadvertent breach of the law had never been part of civil trials, nonetheless there might be extreme circumstances of egregious and knowing infringement of rights which might render the admission of evidence repellent to the good administration of justice. Any such ruling would be necessarily rare since it is impossible to imagine a pursuit for justice which does not have regard to the truth as the foundation for any ruling which affects the rights of litigants. In that regard, the remarks of Fennelly J at 490 are pertinent:

> I turn then to the illegality attendant on the investigation. Here it is easier to find place for the application of the balancing test proposed by Kingsmill Moore J. He stressed the need to have regard to all the circumstances. He was essentially, however, considering the public interest just as was Finlay C.J. in *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110. Was the obtaining of the evidence, the admissibility of which is at issue attended with such circumstances of illegality that it would be unconscionable to allow the authority to use it? The questions which Kingsmill Moore J. posed to himself suggest that a comparatively serious case of intentional illegality has to be established. I agree that an element of deliberate and knowing misbehaviour must be shown, before evidence should be excluded. It is not possible to render unknown something already known. The courts should be slow to adopt any mechanical exclusionary rule which makes it easy to prevent disciplinary tribunals from receiving and hearing relevant and probative material. The balance should be struck between the rights of individuals and those professional bodies assigned the task of supervising their behaviour so as to give careful weight to two competing considerations: firstly, the test adopted should not unduly impede the latter types of body from performing their duty of protecting the public from professional misbehaviour; secondly, members of professional bod[ies] should be protected from such clear abuse of power as would render it unfair that the evidence gathered as a result be received.

7. Any issue as to whether in litigation, where the State deliberately and consciously, in the sense of *DPP v JC*, seek to obtain an advantage in litigation, this has been considered in the case of *Criminal Assets Bureau v Murphy* [2018] IESC 12. Neither any such contention, nor any issue of recklessness or negligence, whether gross or simple, can arise on the facts of this case. The information supplied by the applicants was completely false, save, it seems, for a correct date of birth for both. There is no reality to a judicial review which seeks to overturn a decision to transfer an application for international protection to another Dublin Regulation country where it is now admitted that the applicants are different people to whom they said they were, and who are liable to be processed in Great Britain by reason of having obtained a visa to visit that country. To fail to transfer the application would be to go against the text of the Dublin III Regulation, a European law obligation to which Ireland owes a duty of fidelity.

The text

8. Properly, any issue of interpretation of European Union legal instruments is purposive. This means, as the Court of Justice of the European Union put the approach in Case C-128/94 *Hans Hönig v Stadt Stockach* [1995] ECR I-03389, "it is necessary in interpreting a provision of [European Union] law to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part"; see also Case 292/82 *Merck v Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, Case C-164/98 *International Film Srl v European Commission* [2000] ECR I-447 and Case C-336/03 *easyCar (UK) Ltd v Office of Fair Trading* [2005] All ER (EC) 834.

9. There is nothing to contradict the prior conclusions in the text of the Dublin III Regulation. Recital 27 states that the "exchange of an applicant's personal data … prior to a transfer" is done to "ensure continuity in the protection and rights afforded" to those who seek asylum from persecution. Recital 28 urges the improvement of communications both "between Member States" and "between competent departments". The aim is to reduce "time limits for procedures".

10. Article 34 of the Regulation is enabling. What it does is to allow communication "to any Member State that so requests such personal data concerning" an applicant for international protection. The only restrictions set out are that the communication be "appropriate, relevant and non-excessive for" the purpose of "determining the Member State responsible" and for "implementing any obligation arising" under the Regulation.

11. There is a restriction in Article 34.2 which limits the communication of information to "personal details of the applicant" and, where that is relevant, his or her family members. This is specified as being his or her "full name" or "former name" or nickname, nationality and "date and place of birth". What is involved is the communication of personal data. The process is two-way. As well as personal details, identity and travel papers may be communicated, as may "fingerprints processed in accordance" with the relevant law. Such restriction as is imposed is set out in Article 34.4 which mandates the exchange of such information "only … in the context of an individual application for international protection." Mass exchanges of information for purposes such as social welfare or employment would not appear be authorised, at least under this law. But, that is not this case.

12. Here, the argument for overturning the decision to transfer responsibility to Great Britain is that a request should, in accordance with Article 34.4, "set out the grounds on which it is based". If it is found that information is in error or is inaccurate in consequence of communication between the Member States, then under Article 34.8, data relating to applicants should be "accurate and up-to-date" and if it is not, under Article 34.9, an applicant has "the right of correction or erasure of data relating to him or her." The State also has a right, however, to correct and up-to-date information from those who seek international protection.

13. It is common case that, under Article 12.2, where an applicant in Ireland "is in possession of a valid visa" for another Dublin III Regulation country, then "the Member State which issued the visa shall be responsible for examining the application for international protection", unless that was done as part of a representation arrangement for one country by another.

14. The relevant forms are part of Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Counsel Regulation (EEC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. That was the form used in this case to seek from the British authorities some information on the persons whose names and addresses and dates of birth given were put out of kilter by the false information supplied by them. This form, as Annex V, requires a date and the reference number. The extent to which an applicant can lead the authorities involved astray is in the specification for the "Individual concerned" of their surname, forename, date of birth, place of birth and nationality. In what is referred to on the form as "indicative evidence", it should be specified whether or not such evidence is enclosed.

15. The reason for making a check in the present case is undisputed. Since Ireland is an island off the coast of Europe, air transport to every destination is not catered for and road links easily bring people south from the neighbouring jurisdiction which is part of Ulster. Consequently, statistics have shown that about three out of four persons claiming international protection in Ireland travel through Great Britain.

16. There was no sense in this case of a mass transfer of data. On examining such false data as had been given by the applicants for international protection, it is a question of fact as to whether it was appropriate and relevant to seek data from another Member State. That data was sought not through names and addresses by the provision of passports or national identity cards, but through the only reliable information available to the Irish authorities, namely the applicants' fingerprints.

17. Insofar as consent by the applicants to the taking of their fingerprints has been put in the issue, the argument advanced lacks validity. The forms in use at the time clearly specify that fingerprints taken from applicants for international protection may be shared with other authorities both within this jurisdiction and internationally for the purpose of seeking information as to identity and origin. In making an application on that basis, each of the applicants gave information which was correct, namely their fingerprints. These were allied to information which was deliberately designed to conceal the actual identities of the applicants, along with the fact that they had obtained a visa for Great Britain through the previous provision of their fingerprints, it would seem at the British Embassy in Warsaw. While the applicants contest ever being in Warsaw, their fingerprints were there. There is an obligation on all courts to approach facts with shrewdness and common sense.

Discretion

18. A comment might finally be made in relation to the issue of discretion. Judicial review is not granted as of right but by reason of justice. Circumstances such as behaviour of an applicant, or the absence of justice in providing a remedy, can enable a refusal even though there has been an error in administration or in the application of legal rules. In this instance, the applicants for international protection gave misleading information by denying that they had passports and by further denying that they had a visa to enter any other country in the European Union. Instead, they stated that they travelled to the State through Serbia, Hungary, Austria, France and Britain. That being so, it was within the entitlement of the State, with a view to protecting its international borders, to enquire from those countries nominated as to whether any information existed which might verify the status of those seeking international protection. Through a form of secure communication known as DublinNet, the only verifiable data available to the State was sent to Britain for the purpose of checking as to whether travel through the neighbouring jurisdiction had occurred and as to whether this had happened lawfully, that is to say by entry on a passport accompanied by a visa. As it turned out, there had been an application for a multi-visit visa to the neighbouring jurisdiction which had been issued to these applicants, apparently as Kosovan nationals, on 23 October 2014, to expire one month later. A relevant passport number and a differing name to the one supplied in Ireland was noted in respect of both applicants for international protection. In consequence, on 16 March 2015, the Office of the Refugee Commissioner issued a take-back or 'take charge' request to Britain under Articles 12.2 and 12.3 of the Regulation.

19. While this request was accepted by the British on 13 April 2015, it was also thoroughly checked as to whether the transfer of

responsibility gave rise to any issue of refoulement. It is prohibited under section 5(1) of the Refugee Act 1996 to expel any person from the State where the result would be the placing of that person on "the frontiers of territories where … the life or freedom of that person would be threatened on account of his her race, religion, nationality, membership of a particular social group or political opinion" or where such a person would be "likely to be subject to a serious assault (including a serious assault of sexual nature)." This is also called the rule against refoulement.

20. Manifestly, that did not arise. Possibly, the foundation for this judicial review arose from some aspect of common law reasoning as to when an intrusion into someone's personal space may be justified. Even where the statutory formula is absent, precedent establishes that an arrest should not take place unless there is reasonable suspicion as to participation in the offence, and a search warrant should not be issued unless there is reasonable suspicion that relevant evidence may be found in the place to be searched. Hence, it is very often the case that in challenges to intrusions on liberty or into the privacy of the home, those seeking to justify their lawful authority must show grounds which, if challenged, will show that a reasonable person faced with the information then available would suspect the arrested person of involvement in the offence or that information might be found on a particular premises. Such a reasonable suspicion can be based on hearsay evidence, on the discovery of a false alibi, or on information offered by an informer who is adjudged reliable, and suspicion may be communicated from one State officer to another.

21. That concept does not arise here. If it did, there were more than ample grounds for suspecting that transit had occurred by the applicants for international protection, who lacked passports or any other form of travel document for this country, through the neighbouring jurisdiction.

22. Even were there legal grounds, and there are not, it is clear that the transfer of responsibility under the Dublin III Regulation is clearly correct and that relief should be refused. The applicants for international protection now fully accept that they each held a visa for the neighbouring jurisdiction, that the information found out about them through the use of their fingerprints is correct, and that the Dublin III Regulation applies to them. Even if that is not accepted, that is clearly the reality. Thus, the result in this case is not dependent upon consent. Rather, as a matter of law, the State is entitled to protect its borders and is internationally obliged pursuant to European Union legislation to make this transfer. The Court should therefore uphold it.