

**THE HIGH COURT
JUDICIAL REVIEW**

[2004 No. 740 J.R.]

BETWEEN

NOTHYBA ABDALLAH SOLOMON

APPLICANT

**AND
JAMES NICHOLSON (SITTING AS THE REFUGEE APPEALS TRIBUNAL) AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW
REFORM**

RESPONDENTS

Judgment of Mr. Justice Herbert delivered the 7th day of February, 2006

1. The facts relevant to the determination of this application for judicial review and, which were not disputed at the hearing before me, are as follows. The Applicant is a Sudanese National and was born on the 1st January, 1997. On the application form seeking refugee status in Ireland and in the questionnaire, her family name is rendered, "Solomon", "Sleiman" and, "Suleiman". The Eurodac Search appears to have been made in the name, "Solomon". Some time in the year 2000, she alleges that she, her husband and two dependant children left her country of origin because of war, oppression and a fear of torture and death. On the 6th of May, 2003, the Applicant sought asylum in the Netherlands. In October, 2003 her application was rejected by that Member State of the European Union. On 5th September, 2003, she sought asylum in the United Kingdom. In or about the 10th of April, 2004, she left that Member State while her application was still under examination, because of alleged cruelty and improvidence on the part of her husband. On 13th April, 2004, she sought asylum in this Member State.

2. In the formal questionnaire completed by her on the 20th of April, 2004, she untruthfully stated that she had lived all her life at a stated address in Sudan before she left that country to come to Ireland, to which she travelled via Chad, Libya and Malta. On the 19th of April, 2004 a Eurodac fingerprint search was initiated and the response determined that the Applicant had made the aforementioned applications for asylum in the Netherlands and in the United Kingdom. On the 5th May, 2004, on the standard form required by Article 17 paragraph 3 of Council Regulation (E.C.) No. 343/2003, this Member State applied to the Netherlands to take back the Applicant pursuant to the provisions of Article 16 paragraph 1(c) of Council Regulation (E.C.) No. 343/2003. By a standard form communication dated 24th of June, 2004, the Netherlands accepted responsibility to take back the Applicant but pursuant to the provisions of Article 16 paragraph 1(e) of Council Regulation (E.C.) No. 343/2003.

3. By a letter dated 28th June, 2004, served by registered post, the Applicant was advised that she would be transferred to the Netherlands and was advised of her right to appeal to the Refugee Appeals Tribunal from this decision. On the 8th of July, 2004, the Applicant, through the Refugee Legal Services, submitted a written notice of appeal to the Refugee Appeals Tribunal. This appeal was rejected by the first named Respondent in a written decision dated 22nd July, 2004. By a letter dated 30th July, 2004, served by registered post, the Applicant was informed of this decision. By Motion on Notice dated 17th August, 2004, the Applicant sought leave to apply for judicial review. The Statement to ground the application was filed in the Central Office of the High Court on 18th August, 2004. By Order of this court made the 4th May, 2004, (MacMenamin, J.), liberty was granted to the Applicant to seek judicial review for the reliefs prayed at paragraph 4 of the Statement Grounding the Application. A Statement of Opposition dated the 16th June, 2005, was filed in the Central Office of the High Court on 21st June, 2005, by the Chief State Solicitor on behalf of the Respondents.

4. The reliefs for which the Applicant was given leave to seek Judicial Review are as follows:-

"(a) An Order of Certiorari by way of application for Judicial Review quashing the decision of the first named Respondent dated the 22nd day of July, 2004, notified to the Applicant by letter dated the 30th day of July, 2004, upholding the decision of the Refugee Applications Commissioner that the Applicant's claim for asylum be transferred to the Netherlands.

(b) A Declaration that the decision of the first named Respondent is *ultra vires*, void and of no force or effect.

(c) A Declaration that the provisions of Article 8(8) of the Refugee Act, 1996 (Section 22) Order 2003 (S.I. No. 423 of 2003) was made *ultra vires* and is null and void.

(d) An Interim Injunction by way of application for Judicial Review restraining the second named Respondent, his servants or agents, from deporting, transferring and/or detaining the Applicants, or otherwise implementing or acting on foot of the decision of the first named Respondent herein.

(e) Further, or in the alternative, a Stay on the operation of the decision of the first named Respondent pending the determination of these proceedings.

(f) If necessary, an order extending the time to take the within proceedings.

(g) Such further or other Order as to this Honourable Court shall seem meet.

(h) An order providing for Costs."

5. I find that there is an error of law on the face of the Decision of the learned member of the Refugee Appeals Tribunal, dated 24th July, 2004, which forms the basis of that decision. In that decision the member of the Refugee Appeals Tribunal found as follows:-

"Pursuant to Article 5.2 of the Council Regulation (E.C.) No. 343/2003, and to Article 8(8) of the Refugee Act, 1996 (Section 22) Order, 2003 (Statutory Instrument 423 of 2003), I find that the Applicant having applied for asylum in the Netherlands on 6th May, 2003, prior to her application in this State on 13th April, 2004, that the Netherlands is the Member State responsible, pursuant to the provisions of Article 16.1(e) in conjunction with Article 20.1 of the Council Regulation (E.C.) No. 343/2003, for examining the applicant's application for asylum.

Accordingly, I find that the Netherlands is the Member State that is obliged to take back the Applicant and examine her application for asylum pursuant to the provisions of Article 16.1(e) of Council Regulation (E.C.) No. 343/2003.

I have consider the applicant's Grounds of Appeal and I find that no valid issue has been raised in relation to the

applicability of Chapter III (Articles 5-14) of Council Regulation (E.C.) No. 343/2003.”

6. Earlier in this Decision, the learned member of the Refugee Appeals Tribunal pointed out, correctly, that the jurisdiction of the Refugee Appeals Tribunal in determining an appeal from a decision of the Refugee Applications Commissioner on an issue arising under Council Regulation (E.C.) No. 343/2003, received into national law by Statutory Instrument No. 434 of 2003, (The Refugee Act, 1996 [Section 22] Order 2003), is set out at Article 8 paragraph 8 of that Statutory Instrument in the following terms:-

“In considering an appeal under this Article the Tribunal shall have regard only to whether or not the Member State responsible for examination of the application has been properly established in accordance with the criteria set out in Chapter III of the Council Regulation.”

7. Article 16 paragraph 1(e) and Article 20 paragraph (1) of Council Regulation (E.C.) No 343/2003, upon which the learned member of the Refugee Appeals Tribunal based his decision are part of Chapter IV of Council Regulation (E.C.) No. 343/2003, with a chapter title, “TAKING CHARGE AND TAKING BACK”. They are not part of the express provisions of Chapter III which has a chapter title, “HIERARCHY OF CRITERIA”, nor are they directed to be read together with them, nor are they expressed to be an additional ground whereby responsibility is imposed, as for example by Article 17 paragraph 2, where a request by one Member State to another Member State to ‘take charge’ is not made as quickly as possible and in any case not within the period of three months stipulated by that Article.

8. By Chapter II, Article 3 paragraph 1 of Council Regulation (E.C.) 343/2003, with the title, “GENERAL PRINCIPLES”, it is provided that:-

“Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State which shall be the one which the criteria set out in Chapter III indicate is responsible.”

9. Chapter III Article 5 paragraph 1 of the same Council Regulation provides that, the criteria for determining the Member State responsible shall be applied in the order in which they are set out in that Chapter.

10. Articles 6 to 14 inclusive of Chapter III of Council Regulation (E.C.) No. 343/2003 contain detailed provisions to be applied in strict consecutive order in determining the Member State responsible. The application of each one, starting at Article 6, must be eliminated before consideration may be given to the next. This is expressly mandated by Article 5 paragraph 1 and, is echoed by the wording of Article 13 of the same Chapter III which provides as follows:-

“Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation the first Member State with which the application for asylum was lodged shall be responsible for examining it.”

11. Chapter V Article 16 paragraph 1 imposes an obligation to ‘take charge’ and ‘take back’ on the Member State found responsible for examining an application for asylum. This clearly indicates that this responsibility has already and otherwise been ascertained. This requirement for a pre Article 16 inquiry and, decision as to the responsibility of a particular Member State, is further to be found in the procedural provisions of Article 17 paragraph 3 and Article 18 paragraph 1 of Chapter V. Article 17 paragraph 3 covers both ordinary requests and requests where an urgent reply is asked for and, it requires that:-

“In both cases the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 18(3) and/or relevant elements from the asylum seeker’s statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.”

12. Article 18 paragraph 1 provides that the requested Member State shall make the necessary checks and paragraph 2 of that Article provides, that in the procedure for determining the Member State responsibility for examining the application for asylum established by the Regulation, elements of proof and circumstantial evidence shall be used.

13. Similarly, by Chapter V Article 20, paragraph 1(a) and paragraph 1(b), it is provided that:-

“1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

(a) The request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible:

(b) The Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks.”

14. Chapter VI Article 21 paragraph 1(a) provides that:-

“1. Each Member State shall communicate to any Member State that so requests such personal data concerning the asylum seeker as is appropriate, relevant and non-excessive for:-

(a) The determination of the Member State responsible for examining the application for asylum;”

15. The expression, ‘examination of an asylum application,’ is given a particular meaning by Chapter I Article 2(e) of Council Regulation (E.C.) No. 343/2003 as follows:-

“‘examination of an asylum application’ means any examination of, or decision or ruling concerning, an application for asylum by the competent authorities in accordance with national law except for procedures for determining the Member State responsible in accordance with this Regulation.”

16. I therefore accept the submission on behalf of the respondents that for all purposes of this Regulation the “examination of an asylum application” continues despite a rejection of that application, until the steps indicated in Chapter V Article 16 paragraph 4

have been taken by the relevant Member State.

17. In my judgment the requirement to determine the Member State responsible, solely in accordance with the criteria stipulated by Chapter III of Council Regulation (E.C.) No. 343/2003 is mandatory and cannot be circumvented or overreached. In the instant case, the Netherlands would undoubtedly be obliged to take back the Applicant pursuant to the obligation imposed by Chapter V Article 16 paragraph 1(e) but only if the criteria set out in Chapter III Articles 6 to 14 inclusive had first been properly applied by this Member State and, a clear indication or ruling given as to which of those criteria showed the Netherlands to be the Member State responsible and why. This was not done by the learned member of the Refugee Appeals Tribunal.

18. I am unable to accede to the argument on behalf of the respondents that the decision of the learned Member of the Refugee Appeals Tribunal expressed as follows:-

"I find that the Applicant having applied for asylum in the Netherlands on 6th May, 2003, prior to her application in this State on 13th April, 2004, that the Netherlands is the Member State responsible, pursuant to the provisions of Article 16.1(e) in conjunction with Article 20.1 of the Council Regulation (E.C.) No. 343/2003, for examining the applicant's application for asylum."

19. is a finding that the Netherlands is the Member State responsible for the examination of the applicant's asylum application pursuant to the provisions of Chapter III Article 13. Neither can I accept their argument that everything after the word, "responsible" is mere surplusage and, does nothing more than set out the consequences of this finding or the argument that the following paragraph is not mere repetition but importantly spells out the obligation imposed on the Netherlands arising from that finding. I cannot ignore or strain unduly the plain words used by the learned member of the Refugee Appeal Tribunal and additionally or alternatively I cannot interpolate into his decision words which are simply not there. In any event, such a strained and unnatural reading of the words used would be contrary to the express terms of Chapter V Article 16 paragraph 1(e) of the Council Regulation (E.C.) No. 343/2003. I am further satisfied that there is no genuine ambiguity in this finding by the learned member of the Refugee Appeals Tribunal and, I am satisfied that what is advanced on behalf of the respondents involves the creation of a nonexistent ambiguity so that plain words in their context may be given a wholly artificial meaning.

20. Article 249, (formerly 189) of the Treaty Establishing the European Union, provides that Council Regulation (E.C.) No. 343/2003 is binding in its entirety and directly applicable in this Member State. In the case of *Variola v. Amministrazione delle France* [1973] E.C.R., 981, the European Court of Justice held that:-

"The direct application of a Regulation means that its entry into force and its application in favour of those subject to it are independent of any measure of reception into national law....Member States are under a duty not to obstruct the direct applicability inherent in Regulations and other community Law...and no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it."

21. I agree with the submission made by counsel for the Respondents that the provisions of Chapter II Article 3 paragraph 2 and Chapter V Article 15 of Council Regulation (E.C.) No. 343/2003 have no relevance to the facts of this matter. They each involve the exercise by a Member State of a discretion which was not exercised by this Member State in the instant case. In the circumstances it would be a moot for this court to determine the issue raised at paragraph 4(c) of the Statement Grounding this Application for Judicial Review.

22. The Court will grant an Order of Certiorari by way of Judicial Review quashing the decision of the first named respondent dated the 22nd day of July, 2004. The Court will make no order on foot of the relief sought at Paragraph 4(b) of the Statement Grounding this Application.