



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 102

Record No. 2017/147

**Peart J.
Irvine J.
Hogan J.**

H.N.

APPLICANT/

APPELLANT

- AND -

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

RESPONDENTS/

APPELLEES

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 19th day of April 2018

1. This appeal raises some important questions regarding the operation of the Dublin III Regulation (Council Regulation (EC) No. 604/2013) ("Dublin III") and, in particular, the proper interpretation of the discretionary provisions of Article 17(1) of that Regulation.
2. The applicant, H.N., is an Afghan who was born on the 4th May 1992. On the 13th April 2016 Mr. N. applied for asylum in this State, but a search of the Eurodac database revealed that he had already unsuccessfully applied for asylum in the United Kingdom on the 8th June 2010. On the 13th May 2018 the UK authorities agreed to a "take back" request from this State in accordance with Article 18(1)(b) of Dublin III. (As it happens, the relevant inter-State correspondence refers in error to Article 18(1)(b), whereas this case is in fact governed by Article 18(1)(d). For reasons I will shortly set out, nothing really turns on the mis-attribution of the relevant provisions of Dublin III Regulation in that correspondence.) The Refugee Applications Commissioner subsequently made a decision on the 31st May 2016 to transfer the applicant to the U.K.
3. This decision was then appealed by Mr. N. to the International Protection Appeals Tribunal ("IPAT"), which appeal was dismissed by a decision delivered on the 1st February 2017. The applicant then sought to challenge the validity of the IPAT decision in judicial review proceedings. By decision dated the 13th March 2017 leave to apply for judicial review was granted by the High Court (O'Regan J.) on a number of grounds.
4. In her ruling, however, O'Regan J., however, declined to grant leave on two particular grounds, namely, whether (i) the IPAT itself was entitled to exercise the discretion conferred by Article 17 of the Dublin III Regulation and (ii) whether the IPAT was entitled itself to have regard to the potential impact of Article 8 ECHR in deciding whether or not to set aside the transfer order. The applicant has now appealed to this Court against that decision refusing leave on these grounds. During the course of the appeal this Court was informed that upwards of 100 cases are currently pending in the High Court in which these particular issues have been raised. Given the practical importance of these questions, this Court decided to reserve judgment.
5. Before considering these questions it is necessary first to set out the background to the appeal and, in particular, to consider the findings and conclusions of the IPAT decision. It would nevertheless be only appropriate at this juncture to acknowledge in the first instance the very careful and thoughtful nature of the ruling delivered by the Tribunal member.

The IPAT decision

6. The IPAT first drew attention to the fact that the parties were agreed that although the inter-State correspondence had referred to Article 18(1)(b) of the Dublin III Regulation, the correct legal basis for the transfer was in fact Article 18(1)(d) which provides:

"The Member State responsible under the Regulation shall be obliged to:

(d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third country national...whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document."

7. I agree with the Tribunal member that nothing turns on the incorrect attribution of the relevant provision of the Regulation. This point did not, in any event, form part of the grounds of appeal to this Court.
8. At the heart of these proceedings lay the Tribunal's findings regarding Mr. N.'s poor mental health. The Tribunal member accepted Mr. N.'s evidence in this regard in full and found that he had "ongoing significant mental health difficulties." She continued by saying:

"It appears that the appellant is particularly vulnerable on account of his poor mental health. He presents as traumatised and it is noted that his mental health difficulties are linked to uncertainty regarding the immigration status over the past six years during which time he has been in Europe, from the age of 18. He previously attempted suicide because of this. Moreover, the appellant is from a country which continues to experience internal armed conflict in many areas; he may well have a strong putative claim to international protection on this basis. The situation in Afghanistan changes year on year and it is very different now, in 2016, to the situation appertaining in 2010, when the appellant made his claim for asylum in the UK. However, these facts aside, ultimately the Tribunal concluded that discretion is a matter for the Minister and / or respondent, and not within its purview."

9. The question which arises is whether this view of the Dublin III Regulation is, in fact, correct. It is necessary now to examine the relevant provisions of Article 3(1) and Article 17(1) of the Regulation, along with some of the pertinent recitals to that Regulation.

The relevant provisions of the Dublin III Regulation

10. Recitals 4, 5, 9, 32 and 39 of the Dublin III Regulation state:

'(4) The Tampere conclusions [of European Council in October 1999] also stated that the [common European asylum system] should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(5) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. 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 applications for international protection.

...

(9) In the light of the results of the evaluations undertaken of the implementation of the first-phase instruments, it is appropriate, at this stage, to confirm the principles underlying [the Dublin II Regulation], while making the necessary improvements, in the light of experience, to the effectiveness of the Dublin system and the protection granted to applicants under that system. ... A comprehensive "fitness check" should be foreseen by conducting an evidence-based review covering the legal, economic and social effects of the Dublin system, including its effects on fundamental rights.

...

(32) With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights.

...

(39) This Regulation respects the fundamental rights and observes the principles recognized by the [Charter]. In particular, this Regulation seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the [Charter] as well as the rights recognised under Articles 1, 4, 7, 24 and 47 thereof. This Regulation should therefore be applied accordingly.'

11. Article 3(1) of the Dublin III Regulation prescribes the general rule, namely, that applications for asylum shall be examined by Member States in accordance with the criteria specified in Chapter III (Article 7 *et seq.*). These criteria are essentially that the application should be dealt with in the words of Article 7(2) "on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State." There are a series of special rule for minors (Article 8) and family members (Articles 9, 10 and 11).

12. Chapter IV provides for the position of dependent persons (Article 16) and for what is commonly described as this discretionary clause, namely, Article 17. Article 17(1) provides in relevant part:

"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 this Regulation."

13. Regulation 27 provides that:

"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."

14. In her ruling the Tribunal member rejected the suggestion that she could exercise the discretion conferred by Article 17(1), saying:

"This Tribunal has a full appeal before it in fact and in law. In the Tribunal's assessment, however, Article 17 is directed at Member States. It is, by its own clear terms, a discretionary power ("may"). This would suggest that the Tribunal cannot exercise this discretion itself on an appellate review – that would involve the Tribunal having to step into the shoes of the State, without any clear guidance or policy on how to exercise this discretion."

15. While one can, I think, readily understand the Tribunal member's approach it is nonetheless necessary to point out that shortly after this decision was first given, the Court of Justice has itself given judgment in Case C-578/16 PPU *C.K. v. Republika Slovenija* EU:C: 2017: 127 in which these issues were more fully considered. That case concerned the claims of a Syrian asylum seeker who, it appeared, had had a high-risk pregnancy and had suffered psychiatric difficulties following the birth of the child some months previously. It was accepted that she had previously been given a valid entry visa by the Croatian authorities and the relevant Slovenian Ministry maintained that Croatia was the Member State responsible for the application pursuant to Article 12(2) of the Dublin III Regulation. The Croatian authorities also accepted that this was the position.

16. The Slovenian Supreme Court ultimately referred to the CJEU the questions of whether the national courts could invoke the discretionary clause in Article 17(1) and, if so, what factors ought such courts take into consideration for this purpose in a case such as this.

17. While the Court of Justice does not quite appear to have determined in express terms the precise question referred by the Slovenian Supreme Court the question of whether the courts of Member States may invoke and exercise the provisions of Article 17(1), it seems nonetheless implicit in paragraphs 73-75 of the Court of Justice judgment that national courts might exercise this particular jurisdiction in appropriate cases:

"73 it cannot be ruled out that the transfer of an asylum seeker whose state of health is particularly serious may, in itself, result, for the person concerned, in a real risk of inhuman or degrading treatment within the meaning of Article 4 of

the Charter, irrespective of the quality of the reception and the care available in the Member State responsible for examining his application.

74 In that context, it must be held that, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in his state of health, that transfer would constitute inhuman and degrading treatment, within the meaning of that article.

75 Consequently, where an asylum seeker provides, particularly in the context of an effective remedy guaranteed to him by Article 27 of the Dublin III Regulation, objective evidence, such as medical certificates concerning his person, capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, including its courts, cannot ignore that evidence. They are, on the contrary, under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person....

76 It is, therefore, for those authorities to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned. In this regard, in particular in the case of a serious psychiatric illness, it is not sufficient to consider only the consequences of physically transporting the person concerned from one Member State to another, but all the significant and permanent consequences that might arise from the transfer must be taken into consideration."

18. On this reading of *C.K.*, it would seem to follow – if only way of direct analogy – that, particular having regard to the findings of fact made by the Tribunal member, the Tribunal was also under an obligation to consider exercising the Article 17(1) discretionary power and, where necessary, to examine whether the condition of the applicant's mental health was sufficiently robust not only to withstand a transfer to the United Kingdom, but also to take account of all "significant and permanent consequences" which might flow from that transfer.

19. As I have already noted, the Tribunal member candidly acknowledged in her ruling that she had not in fact conducted this Article 17(1) exercise, since she considered that this was a matter for the Minister and not the Tribunal. Whatever may have been the position prior to the decision in *C.K.*, it is now clear in the wake of that decision that it is at least arguable (in the sense in which term has been used by the Supreme Court in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374) that the Tribunal member was in fact under an obligation to consider exercising this Article 17(1) jurisdiction in the manner I have just indicated.

Conclusions

20. In the light of these conclusions, it is appropriate, therefore, to allow the appeal, at least in part. I would accordingly vary the order of the High Court by granting the applicant leave to argue the following additional ground, which I have taken the liberty of formulating as follows:

"The respondent Tribunal erred in law by ruling that it had no jurisdiction to exercise the jurisdiction conferred by Article 17(1) of the Dublin III Regulation and by failing to consider the consequences for the applicant's mental health of physically transporting him from Ireland to the United Kingdom and all the significant and permanent consequences that might furthermore arise from such a transfer."