THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 77

RECORD NO. 2023/1057JR

BETWEEN

AC

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 12 February 2024

Introduction

1. This is an application for leave to seek judicial review, as well as an application for an injunction restraining the Minister from transferring the applicant back to Spain under Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 (the "Dublin III Regulation"). The application was heard on notice, where the respondents strenuously objected to the injunction application. For the reasons explained in this judgment, I am granting leave on most – but not all – of the grounds advanced. I am granting an injunction restraining the Minister from going ahead with the transfer pending the determination of these proceedings, assuming that they remain as currently constituted,

because the Minister has failed to make a decision on the applicant's Article 17 request, where the process governing such decisions is a key part of the applicant's complaint in these proceedings.

Factual background

2. In brief, the applicant is a 23 year old Algerian national who made an application for international protection in Ireland on 4 April 2022. As disclosed to the International Protection Office (the "IPO"), he had irregularly crossed the border into Spain from Algeria on 20 July 2021. On 3 June 2022 the IPO made a request to Spain to "take back" under Article 13(1) of the Dublin III Regulation. Spain agreed to accept responsibility for the applicant on 15 June 2022. On 15 June 2022 the IPO informed the applicant that Spain had accepted responsibility and he was informed of his entitlement to submit further information on the proposed transfer, including humanitarian grounds.
3. On 5 July 2022 the applicant's solicitors made submissions to the Minister for Justice under Article 17 of the Dublin III Regulation, arguing the applicant was at risk of destitution and onward refoulement if he was returned to Spain and requesting that his application for international protection be determined in Ireland.
4. I pause the chronology of events here to provide some background to an Article 17 request. Article 17 of the Dublin III Regulation provides that 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. In other words, it is a discretion afforded to Member States to depart from the provisions of the Regulation if it wishes to take responsibility for an applicant for protection, even if it would otherwise be entitled to transfer them to another Member State. It is known as the "sovereignty clause".

5. The Supreme Court has determined, following a consideration of Ireland's implementation of the Dublin III Regulation, that neither the IPO, who make the transfer decision, or the IPAT, who are the body designated to hear appeals from the IPO, can make decisions in respect of Article 17 applications. This means that – as in this case – a transfer decision can be made by the IPO and upheld by the IPAT, but an applicant can still assert that the process under the Dublin III Regulation is not concluded on the basis either that no decision has been made by the Minister in relation to the Article 17 request – as is the case here – or that there is an extant judicial review challenging the Minister's refusal to grant Article 17 relief. This bifurcation of the transfer decision and the Article 17 consideration has given rise to some considerable difficulties, as this case demonstrates.

6. In his Opinion in Case-359/22 *AHY v Minister for Justice* (ECLI:EU:C:2023:678), a case referred by Ferriter J. in 2022, Advocate General Pikamäe observed that Article 17(1):

> "*cannot be understood as permitting the establishment of a separate administrative procedure from that which ends with the adoption of the transfer decision. On the contrary, I am convinced that the Dublin III Regulation created a legal regime in which no further administrative measure following the transfer decision can affect its validity*"

7. Advocate General Pikamäe has observed that this dissociation of functions has the following consequence:

> "… *national provisions which dissociate the exercise of the discretion set out in the sovereignty clause from the transfer decision adopted under the Dublin III Regulation, and which allow a request for the exercise of that discretion to be submitted and examined independently of the adoption of a transfer decision and after that adoption, seem likely to hinder the proper functioning of the Dublin III Regulation in general terms, as the Commission acknowledges in its written observations*"

A ruling is awaited from the Court of Justice of the European Union (the "CJEU") on the reference.

8. Returning to the facts of this case, the applicant was informed that the Minister would make an Article 17 decision in due course. As of the hearing of the application on 30 January 2024, over 19 months later, no such decision had been made and no response at all had been provided to the applicant's Article 17 request.

9. Separately, submissions were made to the IPO that it had no authority to make a determination under the Dublin III Regulation as it was not a designated body for the purposes of Article 35 of Dublin III.

10. On 11 October 2022, the applicant was provided with a "Notice of decision to transfer him to another Member State", identifying that the IPO had determined that Spain was responsible for examining his claim for international protection. He appealed that decision to the IPAT on 15 October 2022. On 18 August 2023 the IPAT refused his appeal and affirmed the IPO transfer decision.

11. The within proceedings were opened on 3 October 2023 for the purpose of stopping time and the leave hearing was adjourned on two occasions. On 17 January 2024, the Department of Justice wrote to the applicant instructing him to present himself to the Garda National Immigration Bureau on 25 January 2024 to make arrangements for his transfer. On 29 January 2024 he was issued with a notice to present on 13 February 2024. It was those notices that prompted the within application. I directed that the application be made on notice to the respondents. Submissions were made orally and in writing by counsel for the applicant and respondents.

Leave to seek judicial review

12. Where an applicant seeks to judicially review a decision of the IPAT refusing international or subsidiary protection, he or she must demonstrate that they have advanced substantial

grounds in order to be granted leave. However, where the decision of the IPAT is that a person is to be transferred to another Member State under the Dublin III provisions, any challenge need only meet the considerably lower threshold of arguability i.e., that the grounds of challenge are arguable. That is a low bar, being described in the Supreme Court decision in *O'Doherty & Anor v The Minister for Health & Ors* [2022] IESC 32 at paragraph 39:

> *"It is clear that the threshold of arguability in G. v. DPP is a relatively low bar, but, as Birmingham P. said in the Court of Appeal, it is not a non-existent threshold….*
>
> *The threshold is a familiar one in the law. It is, in essence, the same test which arises when proceedings are sought to be struck out on the grounds that they are bound to fail, or the test that is normally required in order to seek an interlocutory injunction. It must be a case that has a prospect of success (otherwise it would not be an arguable case) but does not require more than that. While, inevitably, individual judges may differ on the application of the test in individual cases at the margins, the test itself is clear. This test – it must be stressed – is solely one of arguability: it is emphatically not a test framed by reference to whether a case enjoys a reasonable prospect of success, still less a likelihood of success. Any such language obscures the nature of the test and may on occasion lead to misunderstanding, appeal and consequent delay."*

13. I will grant leave in respect of the challenge to the decision of the Tribunal on the basis set out at paragraph E1(i) of the Statement of Grounds i.e., that because the IPO is not entitled to make a determination under the Dublin III Regulation absent proof that the requirements of Article 35 of the Regulation have been satisfied, the Tribunal could not make an appeal determination. Article 35 sets out that (i) Member States must notify the European Commission of the body responsible for the obligations under the Regulation, (ii) the name of the notified body must be published in the Official Journal of the European Union (iii)

the notified body "shall receive the necessary training with respect to the application of this Regulation."

14. The applicant makes a second argument to the effect that the failure to interview the applicant under Article 5 of the Dublin III Regulation until after Spain had accepted the takeback request renders the process procedurally improper. I consider this argument very weak. Article 5(3) of the Dublin III Regulation only requires the interview to take place before the decision to transfer is made, not before a Member State accepts the takeback request. The decision to transfer is made by Ireland in this case and the interview took place before any decision to transfer back. Further, in Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21 ECLI:EU:C:2023:934 (hereafter referred to as "*CZA*"), the CJEU has indicated that in certain circumstances, it is acceptable if the interview takes place after the decision to transfer is made. However, given that this is only the leave stage, and the threshold is the low one of arguability, I consider that this argument just about meets that low threshold.

15. I am refusing leave in respect of the challenge to the decision of the IPO as that decision has been replaced by the decision of the Tribunal and therefore is not a decision with any legal effect.

16. Turning now to the Article 17 application, there are three declarations sought in respect of the Article 17 point. Before discussing them, I should emphasise that there is a particular difficulty in this case because, despite an application being made by the applicant for discretionary relief under Article 17 in June 2022, no decision has yet been made by the Minister in this regard. No explanation was given in the course of the hearing for this delay in making a decision. Counsel for the respondents submitted that a decision would be made shortly and in any case before the date upon which the applicant is to be transferred. No affidavit evidence was presented in this respect. Because of the absence of evidence and

because I must take the facts as they present at the time of the application, I cannot take into account that information.

17. The first declaration sought by the applicant is that only the Minister for Justice personally can make a determination under Article 17 and that the authority to make such a decision has not been delegated to any of her officials. Since there is no Article 17 decision in being, this point is entirely hypothetical, and leave should not be granted in respect of a hypothetical point. I therefore refuse leave on that ground.

18. The next declaration sought is that the process for the application and determination of an Article 17(1) application, including relevant timelines, remains unclear contrary to the principle of certainty under European Union law. The absence of a coherent system in Ireland in relation to the making of Article 17 decisions and their relationship with transfer decisions made by the IPO and/or the IPAT was noted by Judge Humphreys as far back as 2017 in *MA & Ors v IPAT & Ors* [2017] IEHC 677 where he said, at paragraph 8:

> *"The drafting of the regulations is unfortunately in my view very unclear and not readily reconcilable with what is now the stated official position, and the situation is crying out for express amendment. There is an urgency to the need for clarification because on an ongoing basis the Dublin system is simply not functioning in the manner envisaged by EU law given the regulations as currently worded. I would suggest that the Minister give serious consideration to making new regulations (or introducing legislation if that is preferred) specifying expressly who exercises the art. 17 discretion for the purpose of future applications, and providing for an appeal therefrom so that an effective remedy is provided; and so that the Dublin system (which has currently, it seems, ground to a halt in Ireland) can potentially function as required by EU law in relation to future cases. There does not appear to be any legal bar to providing an effective remedy under the EU regulation against a first instance decision under art.*

17 by way of regulations under the European Communities Act, 1972. If as I think it does EU law requires such an effective remedy then such a requirement comes within the scope of the regulation-making power under the 1972 Act."

19. This was reiterated by Judge Burns in *FA v IPAT & Ors* [2021] IEHC 147 in March 2021, where she noted that the operation of Article 17 within the jurisdiction could not be characterised as simple or rapid. I have already referred above to the criticism of Advocate General Pikamäe in *AHY* of the separation of the Article 17 decision making process from the transfer process operated by the IPO and the IPAT.

20. Yet despite these judicial observations, and the large amount of litigation Article 17 has generated (see for example *NVU v The Refugee Appeals Tribunal*, [2017] IEHC 490, [2017] IEHC 613, [2019] IECA 183 and [2020] IESC 46, *BK v The Minister for Justice* [2022] IECA 7 and *AHY v The Minister for Justice* [2022] IEHC 198 (31 March 2022), the Advocate General's opinion in *AHY* discussed above, and Case C-661/*17 MA & Ors v IPAT & Ors* (ECLI:EU:C:2019:53), it appears that the position has not altered.

21. There are not even guidelines for applicants as to when to make a request for the exercise of discretion under Article 17, how to make such a request, how to challenge such a request, the time within such a request should be made and so on. In particular, given that there is a bifurcated system, it is surprising that the Minister has not identified how the two systems should operate in harmony to avoid undermining the aims of the Dublin III Regulation insofar as transfers are concerned. The aim of the Dublin III regime is, *inter alia*, to put in place a clear and prompt system for transfers from one Member State to another for certain persons, for example a person who has lodged an application in another Member State, whose application is under examination in another Member State, who has withdrawn an application in another Member State or whose application has been rejected in another Member State. It is important for the coherence of the regime under the Dublin

III Regulation that a clear and predictable approach be adopted in relation to the exercise of the Minister's discretion under Article 17.

22. The process in place in relation to an Article 17 application and decision is of active concern to the applicant as he is waiting for such a decision. Accordingly, I have no hesitation in granting leave in respect of the application for a declaration that the process for the application and determination of an Article 17(1) application remains unclear contrary to the principle of certainty under European Union law.

23. The third declaration sought is that the Minister's determination under Article 17 must issue concurrently with the notice of decision to transfer an applicant to another Member State to allow an applicant to pursue an effective remedy to challenge any refusal under Article 17. As the applicant is awaiting a decision under Article 17, the timing of same is therefore a live issue for the applicant and this relief is not abstract or hypothetical. I will therefore grant leave on this ground also.

24. Finally, I grant leave in respect of the application for an extension of time and costs.

Injunction Application

25. Turning now to the injunction application, the applicant's primary justification for an injunction is that the Minister cannot effect a transfer before the Article 17 determination issues and the applicant has been afforded a reasonable opportunity to challenge same. He says that because no decision on his Article 17 application has been given, no transfer can take place until a decision is provided.

26. He argues that Article 17 discretion is an essential part of the mechanisms for determining Member State responsibility under the Dublin III Regulation and refers to the decisions of the CJEU in Case C-578/16 *CK v Republika Slovenija* (ECLI:EU:C:2017:127) and *MA* in this regard. He argues, following *MA*, that an Article 17 decision should be capable of being challenged at the time of an appeal against a transfer decision and the Minister's

failure to make a decision prevented him from doing this. He refers to the decision of Advocate General Pikamäe in *AHY*, referred to above, and the necessity of this Court waiting until the CJEU has ruled before any transfer can take place.

27. It is notable that no evidence is given by the applicant as to any medical condition that he may have or any particular detriment that he will suffer by being returned to Spain over and above the arguments that he made to the IPAT. In short, he argues that his return to Spain would be a breach of his rights under Article 3 and Article 8 of the European Convention on Human Right as well as under Article 4 and 7 of the Charter of Fundamental Rights. He claims there is a risk of him being rendered homeless and without healthcare if returned to Spain. He relied upon a report from 2019 which highlighted that the Spanish asylum system was unable to respond quickly and effectively to the new migration. He argues that Spain may not abide by its non-refoulement obligations.

28. Identical arguments were raised before the IPAT and rejected. It referred to a significant amount of country of origin material and noted that Spain had taken positive steps to enhance capacity in respect of immigration in 2022 and 2023. The IPAT held that having considered the available country of origin information it was not satisfied that the reception conditions in Spain were such as to amount to systemic flaws in the asylum procedure and in the reception conditions for applicants. It referred to an Asylum Information Database country report for 2022 in this respect. It concluded that Spain was a responsible State and there was no reason to refuse to uphold the transfer decision. The applicant has not identified any new or different circumstances in relation to his return to Spain.

29. On the other hand, the respondents argue that the injunction should be refused for the following reasons. First, there is no evidence of a risk of refoulement, and no such argument should be entertained in respect of a transfer to another Member State, given that the Dublin III system is founded on mutual trust and cooperation among the Member

States. Equally, there is no evidence that the applicant's rights would not be respected in Spain.

30. Second, the respondents argue that there is severe prejudice if an injunction is granted because Ireland's entitlement to transfer the applicant to Spain will expire on or about 22 February under the regime established by Articles 27 and 29 of the Dublin III Regulation. The Advocate General's opinion in *AHY* is cited in support of this contention.

31. They further argue that the existence of a reference to the CJEU should not prevent an injunction being refused, given that the reference procedure is fundamentally designed to enable the national court to resolve the dispute before it. On the other hand, the key matter that must be considered when looking at the balance of justice in the context of an injunction application is the effect of granting the interlocutory measure. A blanket decision to preserve the status quo in any case affected by a reference would set at nought the balance of justice test or at least disproportionately tilt the scales.

32. Finally, they note that the injunction application is being made extremely late in the day, given that it is intended to transfer the applicant on 13 February.

Decision on injunction application

33. In adjudicating on the application for an injunction restraining the transfer of the applicant to Spain, I am applying the principles identified in *Okunade v Minister for Justice, Equality and Law Reform* [2012] 3 IR 152 i.e., whether an arguable case has been made out and where does the balance of justice lie. I have already granted leave on certain grounds and therefore the applicant has met the first part of the test. In respect of the second part of the test, the exercise that a court must engage in is well established: two hypotheses must be entertained, one where the injunction is granted and the other where it is refused. In both scenarios, the benefit and detriment to the respective parties must be identified and

evaluated. In that way, the court is in a position to identify which course of action best advances the interests of justice.

34. Considering the respondents' position first, there is undoubtedly serious prejudice to the respondents if I grant the injunction. For the reasons that I gave in *RG v IPAT & Ors* [2023] IEHC 742, I am of the opinion that the six-month time limit within which the applicant must be transferred will elapse on 22 February 2024, and therefore prevent the respondent from transferring the applicant under the Dublin III Regulation even if the applicant is ultimately unsuccessful in these proceedings. In other words, simply by dint of obtaining an injunction at this stage, as opposed to being successful in the proceedings, the applicant will achieve his aim i.e., to prevent his transfer back to Spain under the Dublin III Regulation. That would normally weight very heavily against the grant of an injunction and indeed in *RG* I refused an injunction for that reason.

35. Equally, as noted above, there are no health reasons invoked to justify the injunction restraining transfer. Nor am I persuaded by the claim to the effect that Spain is a country where the applicant's human rights would not be respected, given the absence of any new evidence in this respect, and the conclusion of the IPAT including its observation that the Dublin III system is based on mutual trust and respect between the Member States. The applicant has the same rights under the ECHR and the Charter in Spain as he does in Ireland and there is no basis put forward for suggesting that Spain will fail to observe its obligations in this respect.

36. However, on the other hand, there is one very important countervailing factor and that is the Minister's failure to make a decision on the applicant's Article 17 application, made more than 18 months ago. The applicant is arguing that he cannot be transferred until a decision is made on his application, given that Article 17 has been held to be an intrinsic part of the Dublin III Regulation. He made the application in July 2022. Despite a decision

of the IPO in October 2022, and a decision on his appeal to the IPAT in August 2023, the Minister still has not made a decision under Article 17. The failure to make a decision in a timely manner, given that the Minister knew the transfer process was moving along and that the six-month clock was running from the time of the Tribunal decision, is unexplained. It is particularly surprising given the potential for challenges to Article 17 decisions to fundamentally undermine an important aim of the Dublin III Regulation (as observed by Advocate General Pikamäe), i.e., to ensure swift decisions in respect of persons who seek international protection in one Member State but may be subject to transfer back to another Member State. Indeed, that detriment is obvious here as this challenge is likely to prevent the Minister from transferring the applicant back to Spain at all given the elapse of the six month deadline set under the Dublin III Regulation.

37. The applicant has sought a declaration that the Article 17 decision must be made at the same time as the transfer decision. Thus, the absence of a decision on Article 17 at the time of the transfer is squarely one of the grounds in the case (although it is true that the IPAT decision is not sought to be quashed on this basis but only on the basis of an alleged breach of Article 35). If I were to refuse an injunction before an Article 17 decision were even made, in circumstances where there is no reason given for the delay in this regard, it would tend to undermine the existence of the Article 17 discretion altogether and might suggest that little importance should be attached to this discretion and that the Minister is free to transfer even where she has not responded to an Article 17 request.

38. It is to be hoped that the decision of the CJEU in *AHY* may clarify precisely how an application for the exercise of discretion under Article 17 interacts with other provisions of the Dublin III Regulation, particularly Articles 27 and 29 on remedies and time limits for challenges to decisions adverse to an applicant. However, until that stage, following the decision of the CJEU in *MA*, I must treat an application under Article 17 as an integral

part of the mechanisms for determining Member State responsibility for an international protection application under the Dublin III regime. To refuse the injunction, thus ensuring transfer before a decision is made on that application, in my view would allow the Minister to benefit from her failure to make a decision, and would be unfair on the applicant.

39. In respect of the existence of the reference as a reason for granting an injunction, I agree with the submission of the respondents that there should not be a blanket policy of granting injunctions simply because there is a reference to the CJEU under Article 267. The facts in each case must be considered individually. In fact the reference here may not be dispositive of the issues in this case since even if the CJEU in *AHY* decides that the resolution of a challenge to an Article 17 decision has suspensory effect and prevents the six month time limit from running (contrary to the views expressed by the Advocate General), that is unlikely to avail the respondents since no Article 17 decision exists in this case.

40. Therefore, the existence of the reference in this case would not necessarily preclude the refusal of an injunction. However, as identified above, the factor that decisively tips the balance in favour of an injunction is the Minister's failure to make a decision on the Article 17 application, despite the applicant making the application before the transfer decision. The applicant is entitled at a minimum to a decision on his application before being transferred. In those circumstances, I consider it would be contrary to justice for the applicant to be transferred before a decision is made.

Conclusion

41. I will therefore grant the injunction pending a decision in the proceedings as currently constituted. I will list the matter before me on **Friday 23 February 2024** to address any costs applications.