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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR189
TO APPLY FOR JUDICIAL REVIEW

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Mr Stuart McTaggart (instructed by James Strawbridge Solicitors) for the Applicant
Mr Philip Henry (instructed by the Crown Solicitors Office) for the Respondent

_____

COLTON J

Introduction

[1] The applicant is a Syrian national currently resident in Belfast.

[2] Whilst the court does not necessarily have a full picture of the relevant chronology the material facts appear to be as follows.

[3] The applicant fled Syria and claimed asylum in Germany on 11 December 2015. On 8 February 2016 he was granted asylum in Germany.

[4] He claimed asylum in the United Kingdom in or around 21 January 2020 when he was detained by representatives of the UK Border Force whilst attempting to travel by ferry from Belfast to Scotland. He had arrived in Belfast after travelling north from Dublin.

[5] In January 2021 he instructed his present solicitor to assist him in relation to his asylum claim.

[6] Correspondence ensued between the applicant's solicitor and the Home Office culminating in a letter dated 1 July 2021 to the applicant.

[7] The letter was headed "Notice of Intent – this is not a decision letter." The text of the letter was as follows:

> "I am writing to inform you about how your case is being managed.
>
> We have evidence that before you claimed asylum in the United Kingdom, you were present in or had a connection to Germany. This may have consequences for whether your claim is admitted to the UK Asylum system.
>
> If your claim is treated as inadmissible, we will not ask you about your reasons for claiming asylum or make a decision on your protection claim. We will attempt to remove you to Germany in which you were present or have a connection, or any other safe country that will receive you.
>
> If within a reasonable period we have not finalised and obtained agreement for your admission to a safe third country, we will admit your claim for a substantive consideration in our asylum system.
>
> If we decide to treat your claim as inadmissible, we will write to you again with a formal decision letter, explaining the full reasons for the decision and the consequences of that decision for you."

[8] In the interim, as part of his bail requirements, the applicant continued to report to the Home Office's Reporting Office in Belfast.

[9] On 27 October 2021 he was detained on the basis that the Home Office had decided not to deal with his asylum claim and it was its intention to effect his removal to Germany on an expedited basis.

[10] He was subsequently released on bail on 2 November 2021 by the Immigration and Asylum Chamber of the First Tier Tribunal.

[11] On 27 October 2021 he was informed of the decision of the Home Office in the following terms:

> "**Asylum and Immigration (Treatment of Claimants, etc) Act 2004**
>
> **Certification of Asylum Application on Third Country Grounds**

> You have applied for asylum in the United Kingdom on the grounds that you have a well-founded fear of persecution in Syria.
>
> On 1 July 2021 we sent you a 'Notice of Intent', to advise you that we were considering whether the UK should substantively consider your asylum claim or treat it as inadmissible. We informed you at that time that if we treated your claims as inadmissible, we would attempt to remove you to Germany (a safe country in which you were previously present), or to any other safe country that would receive you.
>
> We have now reviewed all of the relevant facts in your case. We have decided that your application for asylum should be treated as inadmissible, for the reasons set out below. This means that we will not be substantively considering your asylum claim and will be returning you to the country identified below. …"

[12] The relevant country was identified as Germany.

[13] The decision referred to para 345A of the Immigration rules and indicated that the Home Office had reached its decision because:

> "You could enjoy sufficient protection in a safe third country, including benefiting from the principle of non-refoulement because you have already made an application for protection in that country …"

[14] The decision then referred to para 345B to the effect that a decision may only be made under para 345A if the third country in which a person was present or with which they have been connected is safe. The Home Office was satisfied that Germany is a safe third country for the applicant.

[15] Finally, the decision referred to para 345C of the Immigration Rules which permit the Home Office to remove those whose asylum claims have been treated as inadmissible, either to the safe third country in which they were previously present or with which they have a connection, or to any other safe country that will admit them.

[16] The decision papers included a Notice of Liability to removal.

[17] The reasons for the decision were recorded as follows:

> "You are specifically considered as an illegal entrant to the UK as on 21/01/2020 you were encountered at Belfast Stena Docks attempting to sail on the 11.30 ferry to Lochryan. You said that you had come from Ireland and were travelling onto Glasgow. You have used the common travel area between Ireland and the UK. You could not produce any travel document or provide evidence of lawful basis to be in the UK. You therefore had entered in breach of s3(1)(a) of the IA 1971 – Illegal Entrant."

[18] The applicant challenges the decision of the Home Office to remove him to Germany.

[19] In terms of the relevant chronology leading to the decision under challenge the respondent raises a number of issues. It is contended by the Home Office that the applicant has been dishonest in the course of his application for asylum.

[20] When originally interviewed by the Immigration Officials, the applicant said he had left Syria two years ago, travelled through Turkey and Greece before flying from Italy to Dublin. As is now clear this is inaccurate given his application for asylum in Germany in 2015. He told the UK Immigration Officer he had travelled on a false passport provided by a smuggler. The respondent points out that in fact it would have been open for him to travel by way of permit from the German authorities which would have allowed him to travel internationally.

[21] He did not tell the interviewer he had travelled to Germany or that he had been granted asylum there.

[22] The applicant has not provided any detail in relation to the time he spent in Germany. The court has no substantial information about the applicant's situation between obtaining asylum in Germany in 2016 and arriving in the United Kingdom on 21 February 2020.

[23] Turning to the actual decision made by the respondent it is averred on its behalf that it originally believed he had simply applied for asylum in Germany. This was based on a Eurodac system "fingerprint hit." The Home Office therefore asked the German authorities that he be accepted back pursuant to the "Dublin III Regulations" to determine his application there. However, the regulations only apply to asylum seekers, not individuals who have been granted asylum. The Home Office learned that the applicant had been granted asylum already when Germany refused the "take back" requests made under the Dublin III Regulations.

[24] In June 2020, after being informed that the applicant had been granted asylum the Home Office made a request of the German authorities to take the applicant back

pursuant to the European Agreement on the Abolition of Visas for Refugees 20/04/1959 ("the 1959 Treaty").

[25] The relevant correspondence between the UK and German authorities is as follows.

[26] On 12 June 2020 the Home Office requested the German authorities to accept re-admission of the applicant. The relevant passage of the correspondence is as follows:

> "With reference to the above-named individual, the German Authorities have advised, as per attached notification, that the above-named was granted Refugee Status in Germany.
>
> Therefore we would like you to consider the provisions of the European Agreement on the Abolition of Visas for Refugees – Strasbourg 20/04/1959, based on Article 5 where:
>
> > `Refugees who have entered the territory of a Contracting Party by virtue of the present Agreement shall be re-admitted at anytime to the territory of the Contracting Party by whose authority the travel document was issued, at the simple request of the first-mentioned Party, except where this party has authorised the person concerned to settle on its territory.'"

[27] On 24 June 2020 the German authorities replied confirming acceptance of the applicant.

[28] The text was as follows:

> "Dear Sir or Madam,
>
> Here are the acceptance to your request for the above-named person.
>
> The acceptance is subject to the requirement that the person is actually the above-named person.
>
> Please tell me 5 working days in advance, when you want to take him to Germany. I need the date, day and place of transfer …"

[29] The transfer did not proceed as a result of a combination of travel restrictions arising from the Covid-19 pandemic and these proceedings.

[30] On 26 October 2022 the German authorities confirmed that the acceptance of the applicant remained valid. The text simply states:

> "… With letter dated 24.06.2020 we informed you about our acceptance of the person. It was not possible to remove the applicant at that point because of travel restrictions arising from the Covid 19 pandemic. In the intervening period the applicant raised several different issues in an attempt to prevent removal.
>
> With Email dated 11.08.2021 we informed you that this acceptance is still valid.
>
> I herewith confirm this acceptance is still valid.
>
> However, please note that a re-evaluation of the case might come to a different result in the future in case that the person has not been transferred to Germany by that time."

The applicant's case

[31] The applicant relies on three separate and related heads of challenge namely:

(a) Illegality.

(b) Substantive legitimate expectation.

(c) Breach of policy.

[32] In his succinct and well-marshalled submissions Mr McTaggart focuses on the European Agreement on the Abolition of Visas for Refugees 20/04/1959 Treaty ("the 1959 Treaty").

[33] The purpose of the 1959 Treaty was to bind the signatories to a certain set of rules as to how persons who were considered to be refugees in one European country were to be treated in another European country in terms of having their entry and travel facilitated.

[34] The overriding purpose of the Treaty was set out as follows:

> "The Government's signatory hereto, being members of the Council of Europe, Desirous of Facilitating Travel for Refugees residing in their territory, Have agreed as follows:
>
> **Article 1**
>
> 1. Refugees lawfully resident in the territory of a Contracting Party shall be exempt, under the terms of this Agreement and subject to reciprocity, from the obligation to obtain visas for entering or leaving the territory of another Party by any frontier, provided that:
>
> (a) That they hold a valid travel document issued in accordance with the Convention on the Status of Refugees of 28 July 1951 or the Agreement relating to the issue of a travel document to refugees of 15 October 1946, by the authorities of a Contracting Party in whose territory they are lawfully resident;
>
> (b) Their visit is of not more than 3 months' duration."

[35] The effect of the 1959 Treaty was to permit refugees to travel from one contracting State to another without the need to secure a visa. The UK became a signatory to the 1959 Treaty in 1968.

[36] On 7 February 2003 the then Home Secretary, the Rt Hon Mr David Blunkett MP, made a statement to the House of Commons to the effect that the UK was suspending the operation of the Treaty as far as it was concerned with effect from 00.01 hours on Tuesday 11 February 2003.

[37] The power to suspend the Treaty was provided by Article 7 as follows:

> "1. Each Contracting Party reserves the option, for reasons of public order, security or public health, to delay the entry into force of this Agreement, or order the temporary suspension thereof in respect of all or some of the other parties except in so far as the provisions of Article 5 are concerned. The Secretary General of the Council of Europe shall immediately be informed when any such measure is taken and again when it ceases to be operative.
>
> 2. A Contracting Party which avails itself of either of the options provided for in the foregoing paragraph may not claim the application of this Agreement by any other

> Party save in so far as it also applies it in respect of that Party."

[38] This suspension was then formally entered into by means of a Declaration of Suspension contained in a letter from the Permanent Representative of the United Kingdom dated 7 February 2003 and registered at the Secretariat General on 7 February 2003 under the provisions of Article 7 para 1 of the Agreement.

[39] In light of the suspension the applicant argues that he must have entered the UK unlawfully. Since the date of suspension, no recognised refugee from another signatory country who has entered the UK has done so under the auspices of the Treaty.

[40] Mr McTaggart argues that the respondent cannot avail of the provisions of Article 5 of the Treaty which as will have been seen is excluded from the remit of Article 7. It reads:

> "5. Refugees who have entered the territory of a Contracting Party by virtue of the present Agreement shall be re-admitted at any time to the territory of the Contracting Party by whose authority the travel document was issued, at the simple request of the first-mentioned Party except where this Party has authorised the persons concerned to settle on his territory."

[41] He argues that for this to apply in this case the applicant must have originally entered the UK by virtue of the Agreement/Treaty. Since the Agreement has been suspended it is argued that the applicant has not done so. It seems probable that the purpose of Article 7 provides for a scenario where a refugee did enter by virtue of the Agreement prior to the suspension but who has subsequently outstayed the relevant three-month period. However, as will appear from the rest of this judgment it is not necessary to resolve this argument.

[42] On this basis the applicant argues that the Home Office is acting "ultra vires" due to the lawful fetters that it has imposed on itself since 2003 when it changed its policy regarding the Treaty and by extension the implementation of it and the resulting powers available through the State under it.

[43] It is argued that the Home Office must give effect to the policy outlined in the House of Commons by announcing the temporary suspension of the Treaty under which a refugee such as the applicant could previously have entered the UK lawfully under the Treaty.

[44] The applicant further relies on what he says is a legitimate expectation that the Home Office will follow Government policy which led to the suspension of the

Treaty. Mr McTaggart refers the court to the well-known judgment in *Lumba v SSHD* [2011] UKSC 12:

> "26. As regards the second proposition accepted by Mr Beloff, a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade and Forsyth Administrative Law, 10th ed (2009) p316. As it is put in De Smith's Judicial Review, 6th ed (2007) at para 12-039:
>
> > `there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness.'
>
> The decision of the Court of Appeal in *R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA Civ 1768, [2004] INLR 139 is a good illustration of the principle. At para 68, Lord Phillips MR, giving the judgment of the court, said that the Secretary of State could not rely on an aspect of his unpublished policy to render lawful that which was at odds with his published policy."

[45] The applicant says that he has a legitimate expectation that the Home Office will abide by its own policy which was set out in the House of Commons, in clear and unambiguous terms. He is entitled to rely on it and the court should not allow a departure from the operation of the policy.

The respondent's case

[46] In an equally well-marshalled and focussed submission Mr Henry on behalf of the respondent argues that the applicant's case is essentially misconceived. The focus on the Treaty is misplaced. He argues that the law governing the applicant's case is domestic law and the decision to remove him is in compliance with that law. He argues that it is not for this court to interpret international treaties, or more importantly to determine that such treaties confer rights on individuals or deprive individuals of rights enforceable in domestic law.

Consideration

[47] The starting point must be on what basis is the respondent seeking to remove the applicant to Germany? The applicant characterises the impugned decision as

seeking to remove the applicant to Germany "under the provisions of the 1959 Treaty."

[48] The court is not persuaded that this is in fact the legal basis for the removal. Rather, as set out in the decision under challenge the respondent is acting pursuant to section 10 of the Asylum and Immigration Act 1999 (as amended) and relevant Immigration Rules.

[49] Section 10 of the Act provides as follows:

> "10. **Removal of persons unlawfully in the United Kingdom**
>
> (1) A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it."

[50] Rule 345A of the Rules state:

> "**Inadmissibility of non-EU applications for asylum**
>
> 345A. An asylum application may be treated as inadmissible and not substantively considered if the Secretary of State determines that:
>
> (i) the applicant has been recognised as a refugee in a safe third country and they can still avail themselves of that protection; or
>
> (ii) the applicant otherwise enjoys sufficient protection in a safe third country, including benefiting from the principle of non-refoulement; or
>
> (iii) the applicant could enjoy sufficient protection in a safe third country, including benefiting from the principle of non-refoulement because:
>
> (a) they have already made an application for protection to that country; or
>
> (b) they could have made an application for protection to that country but did not do so and there were no exceptional

circumstances preventing such an application being made; or

(c) they have a connection to that country, such that it would be reasonable for them to go there to obtain protection."

[51] Rule 345B provides a definition of a "safe third country":

"Safe Third Country of Asylum

345B. A country is a safe third country for a particular applicant if:

(i) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;

(ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;

(iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country; and

(iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country."

[52] Immigration Rule 345C states that the UK shall attempt to remove the individual to the safe third country in question:

"345C. When an application is treated as inadmissible, the Secretary of State will attempt to remove the applicant to the safe third country in which they were previously present or to which they have a connection, or to any other safe third country which may agree to their entry."

[53] From these provisions it can be seen that the domestic law is clear. The applicant has no leave to remain, and the Home Office can remove him to what is

clearly a safe country namely Germany who have confirmed that they will accept the applicant back.

[54] On one view this is a complete answer to the applicant's case. However, the court does not ignore the fact that the basis upon which the respondent requested Germany to take the applicant back was based on the 1959 Treaty which has been suspended by the UK Government. In those circumstances it might sit uneasily that the applicant be removed in those circumstances.

[55] In this regard, Mr Henry, sought to persuade the court that he could avail of the provisions of Article 5 of the Treaty.

[56] He sought to argue that in reality the applicant has entered the UK "by virtue" of the Treaty. The inevitable inference from the circumstances of the applicant's entry to the United Kingdom is that he was able to do so by reason of travel documents provided to him by Germany by reason of the fact that he had been accepted there as a refugee. He argues that the fact that Germany agreed to the UK's request to take the applicant back illustrates that this is correct. In the absence of more detailed evidence, the court cannot come to a definitive conclusion on this point.

[57] However, an analysis of the relevant law assuages the court's concerns in this regard.

[58] It is a firmly established rule of UK law that domestic courts do not have the competence to adjudicate upon or to enforce rights arising out of treaties entered into by independent Sovereign States. More importantly it is clear that international treaties do not create rights or obligations that can be enforced by an individual. One need only look at the recent decisions in relation to challenges concerning the withdrawal of the United Kingdom from the European Union for confirmation.

[59] The principle is clearly set out in the judgment of the Supreme Court in *R (Miller) v Secretary of State* [2018] AC 61 as follows:

> "**(e) The effect of Treaties on the domestic law of the UK**
>
> 32. The general rule of the conduct of international relations, including the making and unmaking of treaties, is a matter for the Crown in exercise of its prerogative powers arises in the context of the basic constitutional principle to which we have referred at para 25 above, that the Crown cannot change domestic law by any exercise of its prerogative powers. The Crown's prerogative power to conduct international relations is regarded as wide and as being outside the purview of the courts precisely

> because the Crown cannot, in ordinary circumstances, alter domestic law by using such power to make or unmake a treaty. By making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law. It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights."

[60] What then of the applicant's argument that the Government's policy has created a legitimate expectation for his client?

[61] The high point of the applicant's submission on this issue are judicial comments made in the case of *Higgs v Minister of National Security* [2000] 2 AC 228 where it was stated that:

> "The existence of (an unincorporated) treaty may give rise to a legitimate expectation on the part of the citizens that their Government, in its acts affecting them, will observe the terms of the treaty."

[62] The applicant further relies on dicta in the case of *R v SSHD Ex p Ahmed* [1998] INLR 570. The court held that the entering into a Treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general were entitled to rely because, subject to any indication to the contrary, ratification could be a representation that the Secretary of State would act in accordance with any obligations which he accepts under the relevant Treaty. Such a legitimate expectation could, in turn, give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which he had undertaken.

[63] In the case of *R(Bibi) v Newham LBC* [2001] EWCA Civ 607, the Court of Appeal was dealing with a case of applicants and their families, who having arrived in the United Kingdom as refugees, were accepted by the council as unintentionally homeless and in priority need. The council provided them with accommodation in the erroneous belief that it had a duty to do so. Subsequently, the House of Lords held that local housing authorities were not obliged to secure permanent accommodation for homeless persons, and the Housing Act 1996 restricted the duty to accommodate homeless persons and provided they should not, as such, be given priority in the allocation of permanent accommodation. The council provided temporary accommodation for the applicants. The applicants sought judicial review of the council's failure to comply with its original promise to provide them with legally secure permanent accommodation within 18 months.

[64] The Court of Appeal held that where a public authority had by practice or promise created a legitimate expectation that a person would be granted some

substantive or procedural benefit the court should consider to what the authority had, in fact, committed itself, whether the authority have acted or proposed to act unlawfully in relation to the commitment and, if so, whether to take the substantive decision itself or to remit the matter for the authority to decide afresh according to law.

[65] In para [19] of the judgment the court said:

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

[66] These issues were comprehensively dealt with by the Court of Appeal in England and Wales in the case *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2003] EWCA Ci 666. That case concerned an attempt by an applicant to rely on terms of the Refugee Convention, to which the UK was a signatory as creating a legitimate expectation that could be relied upon in domestic law. It concluded:

> "100. In my judgment it is important that the Convention point should be dismissed on this short ground. Nothing, surely, is more elementary than the certainty required for the identification of what is and is not law in our modern constitution; and we must not be seduced by humanitarian claims to a spurious acceptance of a false source of law. I should say that these considerations have led me to feel, with great respect, some unease in relation to a particular line of authority relied upon by Lord Lester for the claimants, which are to be found in *R v Secretary of State for the Home Department, Ex p Ahmed* [1998] INLR 570, 583-584 and Hubhouse LJ, at pp591-592, indicated, obiter, that the Crown's ratification of, or entry into, a treaty might be capable of giving rise to a legitimate expectation upon which the public in general would be entitled to rely. Reference was made to the decision of the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273 per Mason CJ and Deane J. In *Ex p Adimi* [2001] QB 667 the Divisional Court had to consider Article 31 of the 1951 Convention. Simon-Browne LJ referred to *Ex p Ahmed* [1998] INLR 570, and accepted what Lord Woolf NR had said obiter: he continued [2001] QB 67, 68:

> `By the time of these applicants' prosecutions, at latest, it seems to me that refugees generally had been entitled to the benefit of Article 31 in accordance with the developing doctrine on legitimate expectation …'
>
> 101. A proposition that the Act of ratifying a treaty could without more give rise to enforceable legitimate expectation seems to me to amount, pragmatically, to a means of incorporating the substance of obligations undertaken on the international plane into our domestic law without the authority of Parliament. In the *Chundawadra* case [1988] Imm AR 161 this court held that ratification of the European Convention on Human Rights created no legitimate expectation that the Convention's provisions are to be complied with. In the *Behluli* case [1998] Imm AR 407 a like conclusion was arrived at in this court in relation to the Dublin Convention. Beldam LJ said, at p415:
>
> > 'In … *Minister for Immigration and Ethnic Affairs v Teoh* … it was said that in that jurisdiction ratification of a Convention was to be regarded as a positive statement by the executive government and its agencies that they would act in accordance with the Convention and that the positive statement was an adequate foundation for a legitimate expectation in the absence of statutory or executive indications to the contrary. But as is clear from [*R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696], that is not the law in this country.'
>
> We are of course bound by the *Chundawadara* and *Behluli* cases, which were not referred to in the judgments in *Ahmed* and *Adimi*; and the report shows that they were not cited in the Divisional Court in the latter case."

[67] The Court of Appeal's conclusion on discrimination was overturned on appeal to the House of Lords, but not its conclusion on international law.

[68] In terms of legitimate expectation I do not consider that the temporary suspension of the 1959 Treaty as announced by the then Secretary of State to

Parliament creates the type of expectation upon which the applicant relies to create obligations enforceable in the domestic courts. It is not an assurance which has been given and provided to persons in the applicant's position, rather it is an expectation created between countries on the international plane. It is not something which is enforceable by the applicant in the domestic courts. The situation would be different if the state of Germany had refused to accept the applicant on the grounds of the UK Government's suspension of the 1959 Treaty.

[69] In relation to an alleged breach of policy, breaches of policy do not, of themselves, provide grounds for judicial review. In any event the breach of policy ground adds nothing to the legitimate expectation ground, which is founded on the same alleged policy.

[70] In conclusion the court considers that the applicant comes within the specific provisions of the Immigration Rules set out above in that he is someone who has been granted refugee status in a safe third country who have confirmed, notwithstanding any suspension of the 1959 Treaty by the UK Government, that it will accept the applicant.

[71] I can identify no public law error by the Home Office in coming to the impugned decision.

[72] The applicable domestic law in this case provides for the applicant's removal to a safe country, Germany, which has already granted him refugee status and has confirmed it is willing to accept the applicant back.

[73] Accordingly, the application for judicial review is dismissed.