THE HIGH COURT
JUDICIAL REVIEW

[2020] IEHC 616
Record No. 2020/503JR

BETWEEN:

LK

APPLICANT

-V-

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

Judgment of Ms Justice Tara Burns delivered on the 25th November, 2020

Background

1. In the substantive proceedings herein, the Applicant seeks an order of certiorari quashing the transfer decision of the First Respondent, made on 10 June 2020, which determined that the United Kingdom is the responsible Member State under EU Regulation 604/2013 (hereinafter referred to as "the Dublin III Regulation") to examine the Applicant's claim for international protection.

2. The Dublin III Regulation established the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. This Regulation was transposed into national law by the European Union (Dublin System) Regulations 2014, SI 525 of 2014 and subsequently by the European Union (Dublin System) Regulations 2018, SI 62 of 2018 (hereinafter referred to as "the 2018 Regulations").

3. Article 17(1) of the Dublin III Regulation recognises that a Member State may, in its discretion, assume responsibility for an international protection application made in its territory notwithstanding that the application of the criteria contained in the Dublin III Regulation establishes that another Member State is responsible for that international protection application.

4. An application for leave to bring Judicial Review proceedings came before this Court on 5 October 2020. The Court adjourned the application so that the Respondents could be put on notice of the application, in light of the recent judgment of the Supreme Court in *NVU v. The Refugee Appeals Tribuna*l [2020] IESC 46, which held that the Second Respondent retained the discretionary power, pursuant to Article 17(1) of the Dublin III Regulation, not to enforce a transfer order in respect of an applicant for international protection.

5. The substantive proceedings herein are set down for a telescoped hearing on 27 November 2020. However, the Respondents have brought a motion seeking to set aside a stay over the impugned transfer decision, which automatically was obtained by the Applicant pursuant to paragraph 8(2) of High Court Practice Direction 81 (hereinafter referred to as HCPD 81").

6. Paragraph 8(2) of HCPD 81 provides:-

'[W]here the relief in respect of which leave is sought includes a challenge relating to a decision under the Dublin system, the court has directed by way of a global order that the filing of any such application acts as a stay on the decision proposed to be challenged, until the final determination of the proceedings on that application including the substantive proceedings if leave is granted and any appeal therefrom, unless the court subsequently otherwise orders.'

7. The Respondents' application is not brought with specific reference to the Applicant's proceedings: it is brought on a lead case basis with an argument being made that paragraph 8(2) of HCPD 81 is contrary to the intention of the Dublin III Regulation and is no longer necessitated in light of the judgment of the Supreme Court in *NVU* which finalises the issue which gave rise to the global order in the first place. Presently there are approximately 270 cases in a holding list which have the benefit of the global order.

Background to Paragraph 8(2) of High Court Practice Direction 81

8. Paragraph 8(2) of HCPD 81 came into effect on the introduction of a new practice direction relating to the Asylum, Immigration and Citizenship List on 1 January 2019. However, the practice of applying a global stay in cases where an Article 17(1) of the Dublin III Regulation issue was raised, had been in being for some time on an ad hoc basis. These "global stay" orders were introduced in 2016 by MacEochaidh J in particular and unusual circumstances. The practice of applying a global stay automatically, in cases where an Article 17(1) issue was raised, was continued by O'Regan and Humphreys JJ until it became formalised by paragraph 8(2) of HCPD 81.

Paragraph 8(2) of HCPD 81

9. Paragraph 8(2) of PDHC 81 expands upon the global order approach which had been applied on an ad hoc basis by O'Regan J in the following manner: it applies the application of the stay to any decision under the Dublin system as opposed to simply a transfer decision; the operation of that stay comes into being by virtue of the filing of judicial review papers rather than the grant of leave to apply for judicial review being made by the Court; and it extends the stay until the final determination of the proceedings to include an appeal.

10. The Respondents acknowledge that they did not object to the ad hoc practise or to paragraph 8(2) of HCPD 81 when it came into force. However, they submit that in light of the finalisation of the lead case *NVU* by the Supreme Court, and a decision made by the Second Respondent to allow all applicants in the Article 17(1) holding list to proceed with their applications for international protection in the State, the global order is no longer necessary and serves no useful purpose. They further submit that paragraph 8(2) is contrary to the spirit of the Dublin III Regulation.

The legal basis for the global order

11. The Respondents submit that there is no legal basis, in European Union law, for the global order in paragraph 8(2) of HCPD 81. While Article 27 of the Dublin III Regulation requires an effective appeal to be made available to a person the subject matter of a transfer decision and that the transfer decision not be enforced until such appeal take place, these requirements have been met by the 2018 Regulations whereby the First Respondent is

designated as the appeal body from a decision to transfer an applicant seeking international protection, and such person has a right to remain in the State pending the determination of the appeal by the First Respondent. Accordingly, the State has already provided for an effective appeal in relation to a transfer decision and has provided for a stay on a transfer decision during the currency of the appeal before the First Respondent, in compliance with the Dublin III Regulation.

12. The Dublin III Regulation does not require that an effective review process be made available to an applicant for international protection in respect of an Article 17(1) decision. This has been confirmed by the CJEU in *MA v. International Protection Appeal Tribunal* Case C-661/17, Judgment 23 January 2019. However, of greater significance in terms of the application before the Court, is the following statement by the CJEU at paragraph 76 of its judgment:-

> *"Furthermore, the objective of the rapid processing of applications for intentional protection and, in particular, the determination of the Member State responsible, underlying the procedure established by the Dublin III Regulation and referred to in recital 5 of that regulation, discourages multiple remedies."*

13. Recital 5 of the Dublin III Regulation states, with reference to the clear and workable method envisaged by the Regulation for determining the Member State responsible for examining an international protection application:-

> *"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 application for international protection."*

14. Accordingly, paragraph 8(2) of HCPD 81, is not necessitated by the Dublin III Regulation. In fact, its existence runs contrary to the intention of the Dublin III Regulation which is the rapid identification of the appropriate Member State to deal with international protection applications and the speedy determination of such proceedings.

15. A Court can, of course, regulate its practices for the efficient processing and determination of cases before it. This clearly was the intention of adopting paragraph 8(2) of HCPD 81 whereby the ad hoc practice of granting a global stay in cases raising an Article 17(1) point was adopted into a formalised procedure on the introduction of the new practice direction. However, it is clear that paragraph 8(2) is not necessitated by European Law and that its existence militates against a rapid determination under the Dublin III system. Further, in circumstances where the Supreme Court has determined the Article 17(1) issue, the implementation of an automatic global order is no longer necessitated.

16. For these reasons, the normal procedure whereby a stay can be sought on an individual basis over the implementation of an impugned decision, is a far more effective and appropriate manner to deal with Dublin III decisions rather than the continuance of an automatic grant of a stay.

17. Accordingly, the Court will lift the automatic stay which was placed on the transfer decision made on 10 June 2020 in respect of the Applicant. The substantive proceedings are listed for hearing on 27 November 2020. The Court, when it sits to deliver this judgment, will hear from the Respondents as to their proposal to not implement the transfer decision relating to the Applicant until after the Court gives judgment in the substantive proceedings.

18. Henceforth, paragraph 8(2) of HCPD 81 will be disapplied for future applications seeking leave to bring Judicial Review proceedings in respect of Dublin III decisions.