

**HIGH COURT  
JUDICIAL REVIEW**

**RECORD NO. 2020/741/JR**

**BETWEEN:**

**TAO AND JO, BO, GO AND PO (MINORS SUING BY THEIR MOTHER AND NEXT FRIEND,  
TAO)**

**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL  
RESPONDENTS**

**JUDGMENT of Ms Justice Tara Burns delivered on 8th day of December 2020.**

**General**

1. The First Applicant is a national of Nigeria. The Second, Third and Fourth Applicants are her children. The First Applicant, together with the Second and Third Applicants, applied to the International Protection Office ("hereinafter referred to "the IPO") for international protection on 21 April 2017. The Applicant asserted that they had travelled from Nigeria on 14 April 2017 and arrived in the United Kingdom on the 16 April 2017. She stated that she did not claim international protection in the United Kingdom.
2. On the 25 April 2017, the IPO issued a request for information to the United Kingdom under Article 34 of EU Regulation 604/2013 (hereinafter referred to as "the Dublin III Regulation").
3. The First Applicant submitted an International Protection Questionnaire on the 26 May 2017 in which she stated that Ireland was her primary destination when she left Nigeria, and she had not sought protection from any other country.
4. The United Kingdom responded to the Article 34 request on 17 February 2018, disclosing that the First Applicant had been issued with three visitor visas, the last of which was issued on 28 February 2017, valid from 18 February to 18 August 2017. On 27 March 2018, the IPO made a request to the United Kingdom to take charge of the protection claims under Articles 12(2) and 34(5) of the Dublin III Regulation on the grounds that the First Applicant had been issued with a valid visa for the United Kingdom.
5. On 18 April 2018, the First Applicant presented for an interview under Article 5 of the Dublin III Regulation. On that date, the Fourth Applicant, who had been born in June, was registered as an international protection applicant at the request of the IPO.
6. On 2 May 2018, the United Kingdom accepted the transfer of all of the Applicants under Article 12(2) of the Dublin III Regulation. On 11 May 2018, the IPO informed the First Applicant that the United Kingdom had accepted responsibility under Article 12(2) of the Dublin III Regulation and invited any further submissions they wished to make. The Applicants responded by requesting the IPO to exercise discretion under Article 17 of the Dublin III Regulation.
7. On 11 July 2018, the Applicants were issued with a Transfer Decision. On 16 July 2018, the Applicants appealed the Transfer Decision to the International Protection Appeals

Tribunal (hereinafter referred to as "the IPAT"). The Applicants submitted that the IPO had erred in designating their case as proper for transfer under Article 12(2) and that the IPO had failed to consider their rights under Article 6 of the Dublin III Regulation and/or Article 7 of the European Charter of Fundamental Rights. The Applicants requested IPAT to exercise discretion under Article 17 to retain their applications for international protection within the State.

8. On 15 September 2020, the Applicants, by letter, requested the First Respondent to (i) cancel the decision to transfer the Applicants to the United Kingdom with immediate effect; (ii) alternatively, provide an immediate undertaking not to transfer the Applicants pending a determination of their application for Article 17 relief; (iii) grant the Applicants discretionary relief under Article 17 of the Dublin III Regulation. The First Respondent replied on 23 September 2020 noting that the Applicants' appeal was pending before IPAT.
9. On 5 October 2020, the Applicants submitted Supplemental Grounds of Appeal withdrawing the request to IPAT for Article 17 relief in light of *NVU v. The Refugee Appeals Tribunal & Ors* [2020] IESC 46. However, they submitted that the Transfer Decision be set aside under Article 3(2) of the Dublin Regulation.
10. A Statement of Grounds in these proceedings was filed on 15 October 2020. This was at a time when a decision from IPAT remained outstanding. An application seeking leave to apply by way of Judicial Review was moved before this Court on 19 October 2020. The Court adjourned the application so that the Respondents could be put on notice of the application. On foot of a request by the Respondents, the matter was set down for a telescoped hearing on 27 November. The Applicants were permitted to amend their Statement of Grounds to seek different reliefs. By the time of the telescoped hearing date (27 November), the First Respondent had not considered the Article 17 request. As the hearing did not conclude on that date, the matter was adjourned to 2nd December. At the resumed hearing date, it was indicated on behalf of the First Respondent that she would determine the Article 17 application by 16 December 2020.
11. On 9 November 2020, IPAT affirmed the decision of the IPO which was notified to the Applicants on 20 November 2020.

### **Reliefs Sought**

12. The Applicants seek the following reliefs by way of Judicial Review at paragraph (d) of the Amended Statement of Grounds:-
  1. An Order of *Mandamus* compelling the First Respondent to make a determination in respect of the Applicants' request for discretionary relief under Article 17 of the Dublin III Regulation.
  2. A Declaration that the uncertainty surrounding the determination of issues under Article 17 and the failure to make an Article 17 decision or to indicate when same

shall issue is in breach of the Applicants' rights to fair procedures and effective remedies in Irish and EU law.

3. A Declaration that the imminent cessation of the application of EU law and in particular the Dublin III Regulation in the United Kingdom deprives the implementation of any transfer decision of lawfulness.
  
13. In light of the indication by the First Respondent that she will determine the Article 17 application by 16 December, the reliefs sought at paragraph (d)1 and (d)2 of the Amended Statement of Grounds no longer arise to be considered by this Court. Significant argument took place at the hearing regarding when the Article 17 application was made by the Applicants. In light of the indication by the First Respondent that she will now determine this issue by 16 December, it appears to me that the significance of this argument relates to a cost issue rather than the substantive hearing. Accordingly, I do not intend to deal with the submissions made in this regard at the present time.

**The Effect of the Cessation of the Application of EU Law in the United Kingdom on the Transfer Decision**

14. The Applicants assert that the imminent cessation of the application of EU law in the United Kingdom, and in particular the Dublin III Regulation, deprives the implementation of any transfer decision of lawfulness.
  
15. The issue of the United Kingdom's withdrawal from the European Union and the implications which this has on proposed Transfers to the United Kingdom under the Dublin III Regulation has already been considered by the CJEU in *MA v. International Protection Appeal Tribunal Case C-661/17*. The Court stated at paragraph 54:-

*"[I]t should be recalled that a Member State's notification of its intention to withdraw from the European Union in accordance with Article 50 TEU does not have the effect of suspending the application of EU law in that Member State and that, consequently, that law continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union."*

And at paragraphs 80 to 85:-

*"80. [I]t should be pointed out that that notification, as follows from paragraph 54 of the present judgment, does not have the effect of suspending the application of EU law in that Member State and that, consequently, that law, of which the Common European Asylum System forms part, and the mutual confidence and presumption of respect, by the Member States, for fundamental rights, continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union."*

*81. It should also be added that, in accordance with the case-law of the Court, the transfer of an applicant to such Member State must not take place if there are substantial grounds for believing that that notification would result in a real risk of*

*that applicant suffering inhuman or degrading treatment in that Member State, within the meaning of Article 4 of the Charter.*

82. *In that connection, it should be noted that such a notification cannot, in itself, be regarded as leading to the person concerned being exposed to such a risk.*
83. *In that regard, it is important to state first, that the Common European Asylum System was conceived in a context making it possible to assume that all participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, namely the principle of non-refoulement, and on the ECHR, and, therefore, that those Member States can have confidence in each other as regards respect for those fundamental rights; all of those States are, moreover.... Parties to the Geneva Convention and the 1967 Protocol and to the ECHR.*
84. *Second, as regards the fundamental rights that are conferred on an applicant for intentional protection in addition to the codification, in Article 3(2) of the Dublin III Regulation, of the Court's case-law concerning systemic flaws in the asylum procedure and in the reception conditions of asylum seekers in the State designated as responsible, within the meaning of that regulation, the Member States, as follows from recitals 32 and 39 of that regulation, are also bound, in the application of that regulation by the case-law of the European Court of Human Rights and by Article 4 of the Charter... As Article 4 of the Charter corresponds to Article 3 ECHR, the prohibition of inhuman or degrading treatment laid down in Article 4 has, in accordance with Article 52(3) of the Charter, the same meaning and the same scope as those conferred on it by that convention.*
85. *Third, as has been set out in paragraph 83 of the present judgment, since the Member States are parties to the Geneva Convention and the 1967 Protocol, as well as to the ECHR, two international agreements upon which that Common European Asylum System is based, the continuing participation of a Member State in those conventions and that protocol is not linked to its being a member of the European Union. It follows that a Member State's decision to withdraw from the European Union has no bearing on its obligations to respect the Geneva Convention and the 1967 Protocol, including the principle of non-refoulement, and Article 3 ECHR."*
16. The MA case is determinative of the issues raised with respect to the Declaration sought at paragraph (d)3. The Dublin III Regulation remains operative in the United Kingdom until the transition period ends; the serving of notice of the United Kingdom's intention to withdraw from the European Union does not have the effect of suspending the application of the Dublin III Regulation. Accordingly, transfers to the United Kingdom must continue to be effected under the Dublin III Regulation unless the First Respondent exercises her discretion pursuant to Article 17 not to effect the transfer.

### **Inappropriate Grounds**

17. A significant portion of the Legal Grounds pleaded in the Statement of Grounds fail to relate to the reliefs sought and to the parties joined. For instance, the Decision to Transfer is challenged in circumstances where IPAT has not been joined to the proceedings. Indeed, the grounding papers were filed and the leave application moved before the Court prior to a decision to transfer being affirmed by IPAT. Also, the Court is asked to make determinations regarding the Article 17 discretion which are only open to the First Respondent to make and which have not as of yet even been considered by her. The Court will not deal with such grounds as they are inappropriately pleaded and have no co-relation to the reliefs sought.
18. However, with respect to paragraph (e)5(i), although the legal grounds set out at in that paragraph are not reflected in the reliefs sought, the Court will deal with the assertions made with respect to the Internal Market Bill in light of the alternative declaratory relief which has been sought by the Applicant.
19. In related proceedings, AHS v. IPAT (Unreported, High Court, Burns J., 8th December 2020), a Declaration was sought to the effect that the transfer of the applicant therein *"would be in breach of Article 3(2) of the Dublin III Regulation as there are substantial grounds to believe that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the United Kingdom in light of the approval by its House of Commons of the Internal Market Bill, widely considered to be a breach of international law"*.
20. I stated, in relation to that declaratory relief, at paragraph 27 of my judgment:-

*"A number of significant difficulties arise with respect to the Declaration sought. Firstly, and most importantly, the Internal Market Bill, is just that. It is not an Act of the Houses of Parliament and accordingly, it is not the law of the United Kingdom. It was rejected by the House Lords, before being reintroduced in the House of Commons yesterday. This Court will not grant declaratory relief on a measure which has no lawful or binding effect. Secondly, the Internal Market Bill has nothing to do with asylum law and the United Kingdom's international commitments relating to asylum law. The argument being made is because the Bill, as promulgated, reflected an intention to break international agreements entered into by the United Kingdom, an inference could be drawn that the United Kingdom would in the future depart from its international asylum commitments. This is wild conjecture on the part of the Applicant who, in fairness, did not rely too heavily on this argument. Thirdly, as a matter of logic the approval by the House of Commons of the Internal Market Bill does not lead to a conclusion that there are substantial grounds to believe that there are currently systemic flaws in the asylum procedure and the reception conditions for the Applicant. Deriving as these do from European Law, the asylum procedure and reception conditions for applicants will remain exactly as they presently are immediately after the expiry of the transition period having regard to s. 2 of the European Union (Withdrawal) Act 2018 which states that "EU-derived domestic legislation, as it has effect in domestic law*

*immediately before exit day, continues to have effect in domestic law on and after exit day."*

Accordingly, I am of the opinion that the Internal Market Bill does not raise substantial grounds to believe that there are systemic flaws in the asylum procedure and in the reception conditions for applicants for international protection in the United Kingdom which would amount to a breach of Article 3(2) of the Dublin III Regulation.

**Breach of EU Law**

21. In the Statement of Grounds, there is reference at paragraph (e)9 to a breach of EU Law by the Respondents in their failing to put in place a transparent system for an Article 17 application to be made to the Second Respondent. What relief is sought on foot of this is not specified. Ms Justice O'Regan in *U v. The Refugee Appeals Tribunal* [2017] IEHC 490 found that there was no requirement on the Second Respondent to publish a policy or criteria in respect of the exercise of the Article 17 discretion.
22. In the present case, a formal application to the Second Respondent to exercise her discretion pursuant to Article 17 was made on 15 September 2020. The Second Respondent has indicated that she will determine this application by 16 December 2020, the decision to transfer having only been made by the First Respondent on 9 November and notified to the Applicants on 20 November 2020. No issue arises in terms of transparency having regard to that time line.

**Returning the Applicant to this jurisdiction should an Article 17 decision be made against him which is invalid**

23. A significant portion of the hearing in this matter related to the non-application of the Dublin III Regulation to the United Kingdom after the end of the transition period in the absence of an agreement between the European Union and the United Kingdom in respect of same. Due to the fact that the First Respondent initially had not indicated a timeline for the determination of the Article 17 application, this was a live issue in the case in light of the fact that this Court set aside a "global injunction" which had applied since the time the proceedings were filed pursuant to Paragraph 8(2) of the High Court Practise Direction 81 which had prevented the Applicant's removal from the State. In light of the First Respondent's indication that she will determine the Article 17 application by 16 December, and assuming that she will not take steps to transfer the Applicant before 16 December, that issue is premature until such time as an indication to transfer arises. Furthermore, it is not relevant to the reliefs sought in the Statement of Grounds.
24. I therefore refuse the Applicants the relief sought.