



# THE HIGH COURT

2024 No.695 JR  
[2024] IEHC 479

BETWEEN:

S.P.

APPLICANT

AND

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

RESPONDENTS

THE CHIEF INTERNATIONAL PROTECTION OFFICER

NOTICE PARTY

**Ex tempore JUDGMENT of Ms. Justice Gearty delivered on 29<sup>th</sup> July, 2024**

## **1. Introduction**

1.1 This Applicant seeks leave to quash a decision that she should be transferred back to Sweden and an injunction to restrain her deportation pending the determination of these proceedings. She seeks declarations in respect of the extent of the powers of the Respondents. An extension of time is requested as relief in respect of one decision was sought ten days after the time limit expired.

1.2 The application was heard on notice on Friday 27<sup>th</sup> July and the Respondents resisted the application for an injunction but did not press the Court to refuse leave to apply for review of the substantive decisions and for the declarations.

1.3 The Applicant is entitled to leave as the relatively low bar of arguability has been reached in respect of at least one aspect of the claim. She is not entitled to an injunction; the balance of convenience is against her in this respect.

## **2. Procedural Background and Grounds**

2.1 The Applicant is from Somalia and arrived in Sweden in 2017, where she made her first application for international protection. She arrived in Ireland in 2023 and made an application here on the 21<sup>st</sup> of February, 2023. According to Regulation 604/2003 (“the Dublin III Regulation”) the Member State responsible for this Applicant is Sweden. Dublin III provides for situations in which an applicant from a third country moves from one Member State to another. The aim of the Regulation is to create a clear, rapid and workable mechanism whereby the Member State responsible for an applicant can be identified. The default position is that an applicant is the responsibility of the first Member State they arrive in, not the second. The Dublin III Regulation is premised on mutual trust, in particular that other Member States will adhere to human rights law.

2.2 Under Article 17 of the Regulation, the second Member State can decide to examine an application even though the applicant is not its responsibility. This is a derogation from the usual rule and is a discretion exercisable by the Minister only, according to the Supreme Court in *NVU v RAT* [2020] IESC 46. A decision as to the application of the principles laid down in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 to Article 17 is awaited in separate proceedings before the High Court. Article 17 may be invoked in order to reunite with family in a Member State or on humanitarian grounds.

- 2.3 This Applicant applied for a derogation from the usual rule that she be transferred back to Sweden, under Article 17. Here, medical grounds are the main basis for the Applicant's claim and she claims she will not have access to the necessary treatments or medication in Sweden, if returned.
- 2.4 On 27<sup>th</sup> March 2023, the International Protection Office ("the IPO") made a request to Sweden to take back the Applicant under Article 18(1)(b) of the Dublin III Regulation. Sweden responded on 30<sup>th</sup> March 2023, accepting the application. On 14<sup>th</sup> April 2023, the IPO notified the Applicant that Sweden had accepted responsibility for her.
- 2.5 The Applicant was interviewed under Article 5 of the Dublin III Regulation on 4<sup>th</sup> July 2023. She explained that her international protection application in Sweden had been rejected. Her second application in 2019 was also rejected at first instance and on appeal. She remained in Sweden for five years and was brought to Ireland by a smuggler in February of 2023.
- 2.6 The IPO issued a transfer decision on 24<sup>th</sup> July 2023. The Applicant appealed to the International Protection Appeals Tribunal ("IPAT") on 8<sup>th</sup> August, 2023. She argued that she was subject to a deportation order in Sweden, that reception conditions there are very poor, and that the IPO has no authority to make a determination under the Dublin III Regulation. IPAT held that it had no powers under Article 17 and could not consider this aspect of the claim. As Sweden was a signatory to the Common European Asylum System and other international human rights instruments, IPAT also found that the transfer could not give rise to refoulement. The transfer decision was affirmed by IPAT on 19<sup>th</sup> February 2024.

### **Decision on the Article 17 Application**

- 2.7 On 26<sup>th</sup> March 2024, the Applicant's solicitors applied to the Minister under Article 17 of the Dublin III Regulation. This submission contended that the proposed transfer was *ultra vires* as the IPO had no authority to make any

determination under the Dublin III Regulation. The Applicant also submitted that as a result of her medical condition, there would be an escalated threat to her health if she was transferred to Sweden. She relied also on the reception conditions for asylum seekers in Sweden, describing these as inadequate, and she argued that there was a real risk of refoulement to Somalia.

2.8 On 10<sup>th</sup> May 2024, the Department of Justice issued a decision under Article 17. The decision maker stated that he was satisfied that the materials did not disclose any humanitarian or compassionate grounds such that Article 17(1) of the Dublin III Regulation could be invoked. He concluded that, as the designated officer, he had authority to make the decision following the principles set out in *Carltona*, he examined the regime in place in Sweden and concluded that there was no risk of refoulement and no evidence that a deportation order had issued in respect of this Applicant, whose case now falls to be decided in Sweden.

2.9 In a lengthy and detailed decision, the officer set out some of the relevant case law and pointed to the dearth of evidence from the Applicant as to her actual circumstances in Sweden and any steps taken by her to apply for housing or financial relief, if required, or to appeal a refusal of aid or relief, if such applications were made and refused. The decision maker found that the Applicant was being treated for medical conditions in Sweden and that there is no evidence that she could not access medical care in Sweden nor is there evidence of a risk to her current healthcare regime should she be transferred.

### **3. Statement of Grounds for Judicial Review**

3.1 The reliefs sought and grounds of challenge are set out in the statement of grounds. In summary, the Applicant seeks to review the Minister's decision that she be refused a derogation from the usual rule that she be transferred back to Sweden, basing her claim squarely on medical grounds. The Applicant has

set out several declaratory reliefs, including declarations that the powers set out under the Dublin III Regulation can only be exercised by the Minister in person and not by an official acting on her behalf or by the second Respondent, IPAT. She seeks an injunction restraining her deportation, but this will have consequences, as set out below, if granted.

3.2 The Court of Appeal in *BK v. The Minister for Justice* [2022] IECA 7 and the High Court, in *AHY v. The Minister for Justice* [2022] IEHC 198 and *RG v. IPAT & Ors* [2023] IEHC 742, decisions of Ferriter J. and Hyland J. have considered many of the issues that arise in this case. The Court of Justice of the European Union (“CJEU”) has delivered its judgment, on 18<sup>th</sup> April 2024, in the reference arising out of *AHY*, (Case C-359/22, *AHY v. Minister for Justice*, ECLI:EU:C:2024:334)

3.3 Under Article 29(1) of the Dublin III Regulation, the transfer of the Applicant back to Sweden shall take place within six months of the original Member State accepting responsibility. If this has not occurred, Sweden is relieved of its obligation to take the Applicant back and she remains in Ireland, which must take responsibility for her. As now determined by the CJEU, these proceedings do not stop the clock in respect of the requirement that an applicant be transferred back to the first Member State (here, Sweden, where her application has been refused) within six months.

3.4 In other words, if the Applicant is not returned on or before the 11<sup>th</sup> (or 12<sup>th</sup>) of August, the six month-period will expire, and Ireland becomes responsible for the Applicant. This is relevant to the arguments in respect of the injunction application, as the effect of passing that deadline is irrevocable.

3.5 If, however, the Applicant is transferred back to Sweden and these proceedings are maintained to hearing, and if the Applicant is successful in these proceedings, the Applicant will be returned here under the terms of Article 29.

#### **4. The Test for Leave Applications**

4.1 The test for an application for leave to apply for judicial review is well established: the Applicant must show that she has an arguable case that she will succeed against the Respondents. This does not mean that she must establish a strong or even a substantial case, merely an arguable case. On the other hand, this is not as low a bar as might be supposed; the argument must be on established facts and not a theoretical argument which could be constructed in almost any situation.

4.2 Here, the Applicant raises issues in respect of the delegation of the Minister's powers to grant a derogation under Article 17 to other bodies, namely to IPAT or the IPO. These issues have been discussed but not finally settled in other cases and, at first blush, the application by this Applicant for consideration under Article 17 appears to have been decided by a member of the IPO, albeit acting on behalf of the Minister. Given the detailed discussion of the principles applicable and the different views expressed by the Court of Appeal and the Supreme Court in *NVU* as to the nature of the power in question, and the fact that the application of the *Carltona* principles to the delegation of that power was not determined in *NVU*, the Applicant has reached that low bar.

#### **5. Medical and Delay Grounds for Leave Application**

5.1 The Applicant also argues that the reasons for both the decisions of the Minister and IPAT were irrational, given, in particular, the evidence she established in respect of her medical conditions. The arguments in this respect are much less weighty, in my view. The evidence relied upon by the Applicant is confined to copy medical records, all from the Mater Hospital in 2023, which confirm various medical conditions (such as diabetes and hypertension) all of which were being treated in Sweden.

5.2 The evidence is of a much less serious condition than those set out in comparable cases where Article 17 was invoked, such as in Case C-578/16 *C.K.*

*v Republika Slovenija* (ECLI:EU:C:2017:127) and in *R.G. v. IPAT* [2023] IEHC 742. The records seem to indicate that the Applicant was receiving appropriate medical assistance in Sweden. The main claim appears to be that the regime she enjoyed before she left will change if she is transferred back under Dublin III.

5.3 While this appears to be a weak case, it is stateable and given that this was an urgent hearing and that leave will be granted in respect of the powers of the relevant Respondents, I will also grant leave on the basis of the other stated grounds, leaving the remaining issues raised to be decided after a full hearing. This includes a submission as to the timing of the application under Article 17 and whether it was, in fact, made in 2023 rather than on 26<sup>th</sup> March, 2024. If this is to be a basis for the application, it must be clearly pleaded.

## **6. Conclusions on the Leave Application**

6.1 On the basis outlined above, I will grant leave to apply for the following reliefs:

- i. certiorari of the decision dated 10<sup>th</sup> May 2024 to refuse the Applicant's request for a derogation under Article 17 of the Dublin III Regulation, on grounds set out at (e)1(i)–(vi) and (e)2 of the Statement of Grounds;
- ii. certiorari of the decision of IPAT dated 12<sup>th</sup> February 2024 that the Applicant be transferred to Sweden, on the grounds set out at (e)3.

6.2 The Applicant has asked for an extension of time within which to make her application, which I will also grant at this stage. The application in respect of the decision of IPAT was ten days late but was made within 4 days of the last impugned decision and, in those circumstances, I am satisfied that it would not be fair to withhold leave in respect of the earlier decision when the Applicant has sworn an affidavit confirming her intention to make the application and that she was advised to await the decision under Article 17, after which time she moved swiftly to request leave in these proceedings.

## 7. Injunctive Relief

7.1 The application for injunctive relief must be determined on different principles, outlined by the Supreme Court in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 152 and applied by Hyland J. in *R.G.*. The first test to be satisfied is whether the Applicant has established an arguable case. The next question is whether the balance of justice favours refusing the interlocutory injunction, in other words, whether the applicant's transfer to Sweden should proceed notwithstanding that her judicial review case will not have been determined by August of this year.

7.2 I have already determined that the Applicant has an arguable case in considering whether leave for judicial review should be granted. Looking next at the balance of justice, the Respondents rely on the CJEU decision in joined cases C-411/10 and C-493/10 *N.S. v. Home Secretary* (ECLI:EU:C:2011:865). Here, at paragraph 80, in a passage relied upon by Ferriter J. in his decision in *AHY*, the Court held that it must be assumed that treatment of asylum seekers in all Member States complies with the requirements of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

7.3 The Respondents submit that there was no evidence before this Court that the Applicant will be treated in a manner incompatible with her fundamental rights if she is returned to Sweden. It is also submitted that the only evidence of any medical conditions is contained in medical records which are over a year old and which amount to evidence of treatable conditions and not conditions that pose an imminent danger to the Applicant's health. Further, there is no evidence of a claimed mental health risk, nor is there evidence of an inability on the part of Swedish health authorities to appropriately treat this Applicant.

7.4 This case can be contrasted with that of *AHY* itself, in which there was strong and recent evidence of suicidal ideation. In *R.G.*, the Applicant sought similar injunctive relief. The judgment dealt mainly with suspension of time, Hyland J. holding that the proceedings do not constitute a review within the meaning



of Article 29(1) of the Dublin III Regulation because Ireland had already identified the body that carries out the appeal or review referred to in Article 27, namely, IPAT. In her judgment, Hyland J. also relies upon the Opinion of Advocate General Pikamäe in *AHY*, as support for her conclusion that there is no obligation under the Charter to provide for a second review, such as judicial review in this case. These conclusions were vindicated by the decision of the CJEU in *AHY*.

7.5 This decision of Hyland J. sets out, at paragraphs 67, 68 and 69 some of the logic which influences this Court's decision. There, Hyland J. contrasted the medical evidence in *AHY* with the medical evidence in *R.G.* A similar contrast can be made here. Further, Hyland J. points to the decision in in Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21, *CZA* (ECLI:EU:C:2023:934), with its emphasis on the importance of mutual trust between Member States, including the effective protection of fundamental rights, a decision which had not been handed down when the judgment in *AHY* was delivered.

7.6 Paragraph 69 of *RG* reads:

*“orderly implementation of a system established by law is, in the circumstances of this case, highly relevant to the balance of justice. The take back scheme has been established by the Dublin III Regulation. The preamble to the Regulation identifies that it seeks to deal with the correct country in which an applicant should be processed in an orderly and rapid manner. A decision has been made by the IPO and appealed to the IPAT. In both instances the applicant has had an opportunity to make submissions and has been legally represented. In both cases, the applicant has been unsuccessful. The applicant has identified arguable grounds for judicial review, but the decision of IPAT is prima facie valid despite the challenge that has been mounted. As per Okunade, that decision should command respect.”*

7.7 As in *RG*, there have been similar decisions against this Applicant and the same irrevocable prejudice is done to the Respondents' position if I grant the injunction sought. To paraphrase Hyland J., granting this injunction will mean

that the scheme put in place by the Dublin III Regulation is set at naught as the Applicant will no longer be subject to it after the six-month period elapses. On the other hand, the Applicant can be returned to Ireland if it transpires that the challenged decisions were unlawful. The Applicant need not be present for the judicial review to continue. As in *RG*, the Applicant is being returned to another EU Member State, which must be treated as a safe country. Again, as in *RG*, there is insufficient evidence of systemic concerns about Sweden and the Applicant cannot rely on concerns about refoulement as the basis for an injunction.

7.8 I note that another case is pending in which the limit of the obligation to return will be discussed. On the basis on which this case was argued, it seems that the Applicant can be returned under Article 29(3) if she succeeds on all grounds.

7.9 Finally, the medical evidence records conditions which require care but do not approach the level of seriousness of those in successful cases taken in respect of Article 17. This Applicant presented to the Mater Hospital, after a deterioration in health which arose during her first month here. The emphasis in the relevant letters by treating doctors here is on self-management of her condition. No evidence of any follow up appointment after May of 2023 was brought to my attention. While there is evidence of medical concerns, there is no evidence of imminent risk to this Applicant's health should she be deported.

7.10 In all the circumstances, the balance of convenience favours the Respondents and I will not grant an injunction restraining deportation.

7.11 I will hear the parties as to the necessary consequential orders.