OUTER HOUSE, COURT OF SESSION

[2018] CSOH 17

P1035/14

OPINION OF LORD TYRE

In the petition

O M

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: J Scott QC, Bryce; Drummond Miller LLP
Respondent: Pirie; Office of the Advocate General

2 March 2018

Introduction

[1] The petitioner is understood to be a citizen of Sudan. He entered the United Kingdom illegally on or about 23 July 2014 and claimed asylum the following day. A EURODAC search disclosed that he had claimed asylum in Bulgaria a year earlier. Accordingly, the Secretary of State made a take-back request to the Bulgarian authorities under regulation 18 of EU Regulation 604/2013 (the Dublin III Regulation). On 19 August 2014, Bulgaria accepted the request. The Secretary of State certified the petitioner's asylum claim on EU safe third country grounds, and removal directions were set on 6 October 2014, to be implemented on 15 October. On 14 October, however, first orders were granted in the

present application for judicial review, on human rights grounds, of the decision to remove the petitioner to Bulgaria. In accordance with usual and published practice, the Secretary of State cancelled the removal directions when first orders were granted. The petition was thereafter sisted for a lengthy period of time pending the determination of certain lead cases challenging the validity of the UK's implementation of the Dublin III Regulation.

[2] The petition came before me for a hearing on one particular matter. The petitioner seeks declarator that responsibility for examining his claim for international protection transferred automatically to the UK on about 19 February 2015, and remains vested here, so that it is no longer competent for the UK to transfer him to Bulgaria. He contends that because his removal was suspended by administrative direction under article 27(4) of Dublin III, and not by any of the means listed in article 27(3), the running of the six month period specified by article 29(1) for carrying out the transfer was not deferred by the present proceedings, with the consequence that responsibility for dealing with his asylum claim has passed to the UK in terms of article 29(2).

[3] Arguments similar to the one presented by the petitioner have been considered and rejected by this court on two previous occasions: firstly in an *obiter* passage in the decision of the First Division in *MIAB* v *Secretary of State for the Home Department* 2016 SC 871; and secondly by the Lord Ordinary (Lord Ericht) in *BM* v *Advocate General* 2017 SLT 247. The petitioner contends that those opinions cannot survive the subsequent decision of the European Court of Justice in *Shiri* v *Bundesamt für Fremdenwesen und Asyl*, Case C-201/16, judgment in which was given on 25 October 2017, and that the matter has to be reconsidered in the light of that decision.

The Dublin III Regulation

[4] According to Recital 1 of Dublin III, the Dublin II Regulation (343/2003) required to be recast "in the interests of clarity". Recital 19 referred to the need to establish an effective remedy in respect of decisions regarding transfers to the member state responsible for processing a claim for asylum.

[5] Article 18 imposes on "the member state responsible under this Regulation" an obligation to take back an applicant whose application is under examination and who makes an application in another member state or is on the territory of another member state without a residence document. Chapter III of the Regulation sets out a hierarchy of criteria for determining the member state responsible. Where a member state with which a person has lodged a new application for asylum considers that another member state is responsible, it may request that other state to take back the person (article 23). The request must be made as quickly as possible; otherwise responsibility for examining the application passes to the member state where the new application was lodged. The requested state must make the necessary checks and reply as quickly as possible (article 25). If it agrees to take back the applicant, it must notify the requesting state of the decision (article 26).

[6] Article 27(1) provides that an applicant must have the right to an effective remedy, in the form of an appeal or review, against a transfer decision, before a court or tribunal. Article 27(2) requires that the person concerned be given a reasonable time to exercise that remedy. Article 27(3) then sets out three possible types of provision that member states may make for appeal against or review of a transfer decision. It is common ground that the UK has selected the option in article 27(3)(c), in the following terms:

> "(c) the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that

> an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based."

Article 27(4), however, allows member states to provide:

> "…that the competent authorities may decide, acting ex officio, to suspend the implementation of the transfer decision pending the outcome of the appeal or review".

[7] Article 29(1) imposes a time limit for the transfer from the requesting state to the requested state, requiring it to be carried out:

> "…in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State …to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3)".

In terms of article 29(2), where the transfer does not take place within the 6 months' time limit, the requested state is relieved of its obligation to take back the person concerned, and all responsibility is transferred to the requesting state.

Interpretation of article 29 by Scottish courts

[8] In *Al* v *Advocate General* 2015 SLT 507, the Lord Ordinary (Lady Rae) held that judicial review procedure in Scotland provided an effective remedy that enabled an applicant to exercise his or her rights under article 27(3) to request suspension of transfer pending the determination of a review of the transfer decision. There was, it was held, no inconsistency between what was required by article 27(3) and what was provided by judicial review.

[9] In *MIAB* v *Secretary of State for the Home Department*, the Inner House dealt with 18 cases which had been sisted pending the decision in *Al*, and in which, following the decision in *Al*, minutes of amendment had been lodged to introduce new grounds of challenge. For the reasons stated at paragraph 65 of the opinion of the court (delivered by Lord President Carloway), the court refused to allow the minutes of amendment to be received. However, the court went on to express its *obiter* opinion on the prospects of success of the new grounds that the various applicants had sought to introduce. One of those grounds was that the six month time limit for transfer of the applicant to a country that had accepted a take-back request had expired. It was argued that because the respondent had proceeded, in accordance with article 27(4), to cancel the removal directions by an administrative decision rather than (as she might have done) by insisting that the applicant apply for suspension under article 27(3), the six month time limit in article 29(1) ran from the date of acceptance of the take-back request. In this regard the provisions of Dublin III differed from those of Dublin II, which had not dealt with suspension by judicial proceedings and suspension by administrative decision in different paragraphs.

[10] The court rejected the argument, stating *inter alia* (at paragraphs 68 and 69):

> "[68] It does not follow, however, that each article of Dublin III enshrines a right which is vested in the applicant. In particular, as with Dublin II, many of the time limits are solely intended to regulate the position as between different Member States. They permit, for example, a Member State, into which an applicant has first entered, to refuse to receive back that applicant from another Member State if certain time limits have expired or other circumstances exist…
>
> [69] Article 29 of Dublin III provides that time will not start to run until there has been a final decision on a review where 'there is a suspensive effect in accordance with Article 27(3)'. Article 27(3)(c) refers to the situation where the applicant has had 'the opportunity to request … a court… to suspend the implementation of the transfer decision pending the outcome of his or her… review'. That opportunity was afforded to the petitioners. The result of the court granting first orders was that the respondent cancelled the removal directions. That did not alter the fact that an opportunity had been afforded to the petitioners in terms of Article 27(3)(c) and a

> 'suspensive effect' followed therefrom because the state in effect suspended the transfer decision. In addition, the respondent's argument that a contrary interpretation would achieve an absurd result has merit. After all, the respondent can hardly ask the court to suspend her own decisions. The purpose of Article 29 is to place a limit on the time it takes for the transferring state to act after acceptance of the transfer, subject to the existence of an ongoing review process at the instance of the applicant…"

[11] The point which had been addressed *obiter* in *MIAB* arose for decision in *BM* v *Advocate General*. In that case an Albanian national arrived in Belgium with his family and claimed asylum, which was refused. He then sought entry with his family to the UK and claimed asylum. The respondent's take-back request was accepted by the Belgian authorities. Removal directions were issued but, when the petitioner applied for judicial review of the removal decision, the directions were cancelled. As with *MIAB*, the action was then sisted pending the outcome of *Al*. By the time the case proceeded, considerably more than six months had elapsed since the date of acceptance of the take-back request, and the petitioner contended that Belgium had been relieved of its obligation to take him back. The argument was the same as in *MIAB*: the separation of suspension by a competent authority to a separate provision in article 27(4) had been a deliberate act by the drafters of Dublin III to allow suspensive effect only where there had been a decision by a court.

[12] The argument was again rejected. Having cited the passage from *MIAB* at paragraph 69 set out above, the Lord Ordinary continued (at paragraph 23):

> "In my opinion the above passage sets out the proper approach to the interpretation of Article 29(1). I agree that the purpose of Article 29 is to place a limit on the time it takes for the transferring state to act after acceptance of the transfer, subject to the existence of an ongoing review process at the instance of the applicant. The Article must be construed with that purpose in mind. The appellant advanced an alternative construction based not on that purpose but on the separation into separate paragraphs of suspension by the court and suspension by a competent authority. In my opinion that mere separation is not enough to demonstrate a purpose which is different from that set out by the Lord President. The petitioner's argument was that the separation into two paragraphs was to give effect to a deliberate change in policy from Dublin II to the effect that suspension of the six

> month time limit would cease to apply to suspensions by competent authorities and apply only to suspensions by courts. No such change of policy was articulated in the recitals to Dublin III. I was referred to no potential aids to construction such as *travaux préparatoires* or EU policy statements or academic commentaries which might have supported that argument. In these circumstances the separation in the drafting falls to be construed within the purpose set out by the Lord President above. That purpose would not be well served if the time limit and suspension provisions had different effects depending on the arbitrary question of whether suspension happened to be by a court or competent authority."

[13] The Lord Ordinary then addressed, *obiter*, a separate argument as to whether article 29 enshrined a right that was vested in the applicant. Under reference to *MIAB* at paragraphs 67 and 68, he expressed the view that it did not, observing (paragraph 26):

> "In my opinion, on a proper construction of the Regulations, the time limits in article 29(1) are solely intended to regulate the matter between member states. That construction is in accordance with the purpose referred to in para 23 above."

The decision of the Court of Justice in *Shiri*

[14] In *Shiri*, an Iranian national entered Bulgaria and claimed asylum. He subsequently lodged an application in Austria, and the Austrian authorities requested the Bulgarian authorities to take him back. The Bulgarian authorities agreed to do so and the Austrian authorities ordered his removal. Mr Shiri challenged the decision and sought suspension of removal. Without ruling on the latter application, the court annulled the removal decision. The Austrian authorities then issued a fresh decision declaring Mr Shiri's application for asylum inadmissible and determining that his removal to Bulgaria was lawful. Mr Shiri appealed against the second decision and applied for the appeal to be accorded suspensive effect. He subsequently amended his appeal to add an argument that because six months had now elapsed since the date of Bulgaria's acceptance of take-back, his application had to be dealt with by Austria. The case eventually reached the Austrian Upper Administrative

Court, which referred two questions to the Court of Justice for a preliminary ruling. Those were:

> "1. Are the provisions of [the Dublin III Regulation] that confer the right to an effective remedy against a transfer decision, in particular Article 27(1), to be interpreted as meaning that an applicant for asylum is entitled to claim that responsibility has been transferred to the requesting Member State on the ground that the six-month transfer period has expired?
>
> If the answer to Question 1 is in the affirmative:
>
> 2. Does the transfer of responsibility under the first sentence of Article 29(2)… occur by the fact of the expiry of the transfer period without any order or, for responsibility to be transferred because the period has expired, is it also necessary that the obligation to take charge of, or to take back, the person concerned has been refused by the responsible Member State?"

[15] The Court decided to answer the second question first. Rejecting a submission to the contrary by the UK government, it considered that where a transfer does not take place within the six month time limit, responsibility is transferred automatically to the requesting state, without it being necessary for the requested state to refuse to take back the person concerned. As to the first question, the court ruled that an applicant for asylum who wishes to rely upon the expiry of the six month period to resist a take-back transfer must have an effective and rapid remedy available under national law to enable him to do so. Again a contrary argument by the UK government, namely that applicants should not be entitled to challenge a transfer decision on the ground that the transfer period has expired, was rejected.

[16] The Court did not require to decide whether the six month transfer period had in fact expired in the circumstances of Mr Shiri's case. The Advocate General (Sharpston) observed that it was for the referring court to grapple with the complex issue of how the Dublin III rules interlinked with the relevant provisions of national legislation. In that connection, the Advocate General stated (Opinion, paragraph 67):

> "In my opinion, Article 29(1) envisages that the period for carrying out the transfer will begin to run once the future implementation of the transfer is, in principle, agreed upon and certain and only the practical details remain to be determined…"

Argument for the petitioner

[17] On behalf of the petitioner, it was submitted that the interpretation of article 29(1) adopted in *MIAB* and *BM* had to be reconsidered. The proposition that the six month time limit was suspended by the Secretary of State's administrative cancellation of removal directions could no longer be sustained. It was clear from *Shiri* that the underlying purpose of the Regulation was the rapid processing of applications for asylum. The requested state had to know where it stood; the only basis upon which the six month period was extended was where there had been suspension by a court or tribunal of a transfer decision. *Shiri* had shifted the focus from the opportunity to seek suspension to an actual decision by a court or tribunal. In the absence of any judicial decision to suspend, article 27(3) was not engaged. Cancellation of removal directions was not the same thing as suspension. The mere existence of court proceedings did not of itself extend the six month period. Having regard to the purposive interpretation of the Regulation adopted in *Shiri*, with the focus on rapid processing of applications, if a decision under article 27(4) could be read as a decision under article 27(3) for the purposes of article 29, this could only be done if the decision was taken within a reasonable period of time. A delay of three and a half years, as in the present case, took the matter outside article 27(3), with the result that the requested state was relieved of its take-back obligation. If the court was in doubt as to the proper interpretation of article 29, a reference should be made to the Court of Justice for a preliminary ruling.

Argument for the respondent

[18] On behalf of the respondent, it was conceded that in the light of *Shiri* it could no longer be contended that an individual applicant could not rely upon the expiry of the six month time limit to challenge a transfer decision. But the Court had not been asked to, and did not, express an opinion as to when, on a proper interpretation of article 29(1), the time limit expired, because the Austrian proceedings had not reached that stage when the reference was made. There was nothing in *Shiri* to cast doubt on the correctness of the observations made in *MIAB* and the decision in *BM* regarding the effect of an administrative cancellation of directions falling within article 27(4). Those cases were correctly decided. The petitioner's argument resulted in manifest absurdity and so should be rejected. Even if the respondent's interpretation could not be characterised as the literal one, it was in accordance with the objective and scheme of the legislation as a whole. The petitioner's alternative reading would not advance the purpose of article 29, which was directed at delays in acting on the acceptance of a take-back request. It would defeat the purpose of article 27(4), given that it might take longer than six months for a final decision to be issued on an appeal or review. The Advocate General's opinion in *Shiri* supported the approach taken in *MIAB*.

[19] In any event, even if there had been a breach of the time limit in article 29, the court had a discretion not to grant the remedy sought by the petitioner and should decline to do so. The petitioner had suffered no prejudice: the removal directions had been cancelled by the Secretary of State because the petitioner had asked her to do so. He had delayed in requesting the declarator now sought. The unlawfulness was a technicality. Granting the remedy would be contrary to good administration: if petitioners could resist removal on the ground argued here, court time and money would have to be wasted on unnecessary

motions for interim suspension. Notwithstanding the decision in *Shiri*, the Secretary of State had a statutory power under the Immigration Act 1971 to remove the petitioner. Even if exercise of the power would be unlawful in terms of *Shiri*, the court had a discretion to refuse to grant the remedy sought.

Decision

[20] I accept, as was recognised by the respondent, that certain observations made in *MIAB* and *BM* respectively cannot stand in the light of the judgment of the Court of Justice in *Shiri*. The observation by the court in *MIAB* at paragraph 68 that many of the time-limits in the Dublin III Regulation are *solely* intended to regulate the position as between different member states is, at least as regards the six month time limit in article 29(1), inconsistent with the Court's ruling that an applicant is entitled to rely upon expiry of the time limit in order to resist a transfer to the requested state. The same goes for the *obiter* observation of the Lord Ordinary in *BM* at paragraph 26 that the time limits in article 29(1) are solely intended to regulate the matter between member states.

[21] On the other hand, there is, in my opinion, nothing in *Shiri* that casts any doubt on the correctness of the views expressed in both *MIAB* and *BM* regarding the suspensive effect of an administrative cancellation of removal directions falling within article 27(4). That issue simply did not require to be addressed by the Court in *Shiri*. I reject the contention that the references by the Court to the objective of rapid processing of asylum applications indicate that a decision by the "competent authorities" to suspend implementation of a transfer decision should not be treated in the same way as a decision of a court or tribunal with regard to the six month time limit. The Court's assertion of the applicant's entitlement to rely on the expiry of the six month period begs the question of when that period begins to

run. Article 29 clearly envisages that where there has been "a suspensive effect in accordance with article 27(3)", the six months will not start until the final decision on an appeal or review has been given, which may be much more than six months after the date of acceptance of a take-back request. There is nothing in the court's decision to suggest that the position is different where the suspension is by administrative rather than judicial decision. The observation by the Advocate General quoted above is, in my view, strongly supportive of there being no such difference.

[22] For my part, I respectfully agree with the interpretation of article 29(1) preferred by the court in *MIAB* and by the Lord Ordinary in *BM*. In my opinion the phrase "a suspensive effect in accordance with article 27(3)" is a shorthand reference to the type of suspensive effect described in article 27(3): that is, suspension of the implementation of a transfer decision pending the outcome of an appeal or review by the person concerned, who has had the opportunity to request suspension by a court or tribunal. On a purposive construction of articles 27 and 29 read together, it matters not whether that suspensive effect is achieved by an order of a court or by a decision of the "competent authorities": the effect is the same, and is a suspensive effect of the kind set out above. I also agree with the observations in both of those cases, and in the submissions by the respondent in the present case, that the interpretation contended for by the petitioner gives rise to obvious absurdities, including the potential need for the Secretary of State to ask the court to recall her own decision to suspend in order to avoid the automatic passing of responsibility to the UK after six months, which failing the petitioner could benefit from a decision which he himself had asked her to make. Far from interfering with the objective of rapid processing of asylum applications, the interpretation that I favour promotes that objective by avoiding unnecessary and time-consuming suspension requests to the court.

[23] For these reasons, I refuse to grant the declarator sought by the petitioner. I do not regard it as necessary to make a reference to the Court of Justice in order to enable me to reach my decision.

[24] In the light of my decision, it is unnecessary for me to consider whether to exercise the court's discretion not to grant the order sought. However, had it been necessary to address this issue, I would not have refused to grant the order. I note that in both *Al* and *BM*, the respective Lords Ordinary indicated that even if they had taken the view that the Secretary of State had acted unlawfully they would not have granted the order sought. In *Al*, it was held that no prejudice had been suffered by either petitioner. In *BM*, the petitioner's asylum claim had already been dealt with by the Belgian authorities and there was no suggestion that the UK authorities would make any different decision, so again there had been no prejudice to the petitioner in being able to stay in the UK during the period since suspension of the removal directions.

[25] The situation in the present case is very different. Had I found in favour of the petitioner, it follows from *Shiri* that responsibility for dealing with the petitioner's application would have passed to the UK automatically in 2015. Were this court to decline to grant the order sought, it would, on that scenario, be authorising the Secretary of State to act unlawfully in proceeding to implement her transfer decision in clear breach of the UK's obligations under the Dublin III Regulation. That would have implications not only for the petitioner but also for Bulgaria which would be entitled, according to *Shiri*, to refuse to take the petitioner back. I did not hear any satisfactory explanation of what might happen in that eventuality. In these circumstances it seems to me that it would have been entirely inappropriate for the court to exercise its discretion in favour of the respondent and to refuse to grant the order sought.

Disposal

[26] The other issues raised in the petition remain to be determined. I shall put the case out by order to discuss further procedure. Expenses are reserved.