R (on the application of Salah Ali Eisa) v Secretary of State for the Home Department (Dublin; Articles 27 and 17) [2017] UKUT 00261 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

The Queen on the application of
Salah Ali Eisa

Applicant

v

Secretary of State for the Home Department

Respondent

THE HON. MR JUSTICE COLLINS

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Mr R Pennington-Benton, instructed by Lawrence Lupin Solicitors appeared on behalf of the Applicant.

Mr B Tankel, instructed by the Government Legal Department appeared on behalf of the Respondent.

(1) Judicial review is a remedy of sufficient flexibility to comply with Article 27(1) of Regulation 604/2013 (Dublin III).

(2) Since an applicant is allowed to remain while this review is being dealt with, there is a suspension of the 6 months within which transfer must be effected in accordance with Article 27(3) of Dublin III.

(3) There is no obligation on the Secretary of State to exercise the power under Article 17 to deal with a claim and, albeit a refusal to exercise the discretion under Article 17 is judicially reviewable, it would require wholly exceptional circumstances to justify any relief being granted if otherwise there was no bar to transfer.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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MR JUSTICE COLLINS:

1. This application has an unfortunate lengthy history because the two decisions which are essentially challenged, namely the refusal to consider the asylum claim made by the applicant which was on 9 August 2015, and a subsequent decision to refuse and certify as clearly unfounded, his application under Article 3. This all stems from the use made of the Dublin III Regulation that the applicant should be returned to Italy because Italy is responsible under that Regulation for dealing with his asylum claim.

2. He is a Sudanese national. He left Sudan in December 2014, travelled to Libya, then on a boat arriving in Italy at the end of March 2015. He was arrested in Italy, fingerprinted, kept for a night at a police station and then released. He only stayed in Italy for five days, he says, having nowhere to sleep and he was not provided with any food or other sorts of relief. He was apparently told by the agent who had presumably been responsible for getting him into Italy in the first place that asylum seekers did not receive help or support in Italy. He then travelled by train to France and stayed for some time in the jungle in Calais. He managed to conceal himself in the back of a lorry and arrived in this country on 9 July 2015, whereupon he claimed asylum. It is not necessary for the purposes of this judgment to go into any detail in relation to the merits of his claim for asylum. Suffice it to say that it includes as it now transpires an indication that he was tortured for some time when he was in Sudan and there is evidence that the scars that he has on his body are consistent with his account of torture that he underwent.

3. The reason why it is not necessary to go into that is because this application before me is limited. There has been a lengthy history of various orders that have been made. Originally, Upper Tribunal Judge Hanson decided on 16 November 2015 that

his application for permission was to be refused. There was a renewal application made which in the end succeeded and a decision was made eventually by Judge Freeman that the permission should be limited to an argument that Article 27(1) of the Dublin III Regulation extended to enable material to be put before the court to challenge the transfer on the basis that it should be for the United Kingdom to determine the matter under Article 17. That was not specifically spelt out by Judge Freeman, but that is what essentially this application before me is all about. The question raised was whether judicial review was capable of providing the applicant with an effective remedy in the form of a review in fact and in law against a transfer decision before a court or Tribunal. Those are the words in Article 27(1) of the Regulation.

4. That is not, as far as I can see, at issue between the parties. Judicial review is flexible enough, as will become apparent, to enable factual issues if they go directly to the lawfulness of a transfer, or if they go to whether a transfer would breach Article 3 rights, in particular, of an individual, to be determined. If there is an issue of fact which needs to be determined in order to decide whether the criteria required to enable transfer to take place under the Regulation were met, then such cross-examination as was needed could take place. There is no question, and there never has been, that judicial review is flexible enough to meet the needs of justice in an individual case. That has never been a problem in relation to human rights cases because it has always been recognised that whether there is a breach of human rights and whether, in a given case, if the right is not absolute, the action is proportionate is a matter for the court to decide, not a question as to whether the decision of the decision maker was one which could only be challenged on Wednesbury grounds. That is the general approach to human rights. Equally, if, as I say, the decision in question that is impugned goes directly to whether a particular course of action would be lawful, there may be a factual issue to be decided and if there is, that can be decided even on judicial review. What is not normally permitted in judicial review is to allow subsequent factual issues sought to be raised to be entertained, apart from human rights issues, and there is a general rule in judicial review that factual matters

that were not put to the decision maker at the time are not normally able to be relied on.

5. So, as I say, the issue essentially before me that has been raised is the contention that even if it is not possible to say that the applicant's human rights in terms of Article 3 would be breached if he were returned to Italy, nonetheless, it is open to the Secretary of State to consider and the court can consider the issue as to whether she ought to exercise her power to entertain the application, notwithstanding that she would not be required to if the Dublin criteria were met.

6. It is necessary therefore first to look at the relevant provisions of the Dublin Regulation, which is Regulation EU No 604/2013, known as I have said as Dublin III which superseded the previous Regulation Dublin II. One important difference between Dublin II and Dublin III is that under Dublin III an individual is entitled to put before the domestic court arguments as to whether there has been a proper carrying out of the provisions which enable transfer. There is now an appeal or review which can be made against a transfer decision.

7. The preamble to the Regulation contains, as always, a number of provisions which can be used to consider the correct interpretation of any of the Articles. The purpose behind the Dublin III Regulation is clear enough. It is that there should be a system which establishes which state is responsible for deciding an asylum claim and the normal provision would be that the state which is responsible is the first state into which the asylum seeker comes. In 2013 that may well have created no apparent difficulties, but as we all know, in the light of what has been happening in Syria and the extent of would-be refugees coming from Africa via usually Libya on boats to again usually Italy, has meant enormous pressure on countries such as Italy, Greece and other states which border the Mediterranean. It is not for the court, nor is it a material consideration in construing the Regulation that it may be argued that the whole basis of Dublin is in doubt. That is a political matter and it is not a matter which is material in deciding the approach of the court. What it does mean though and has meant is that the pressure on the frontline countries, if I may call them such,

has meant that they in some instances have not been able to provide for would-be asylum seekers sufficient by way of accommodation or assistance so that that there has not been compliance with the dictates of Article 3 of the ECHR or Article 4 of the Charter of the EU which is effectively the same as Article 3, and those arguments have been raised in relation to some of the frontline states.

8. Paragraph 19 of the preamble provides, and I quote:-

> "In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred."

That makes clear that there must be an examination of the manner in which the Regulation has been applied in an individual case, that is to say whether the hierarchical criteria as they are called have properly been applied; and secondly, whether there are such problems in the Member State to which the applicant is to be transferred as mean that it is not appropriate in all the circumstances because there would be a breach of his human rights were he to be transferred.

9. Equally, it is clear that one of the purposes of Dublin is to try, so far as possible, to ensure that there is a speedy process leading to the transfer, if transfer is appropriate, so that there can be a speedy consideration of an application for asylum. That of course is not only in the interests of an applicant, but also in the interests of ensuring that those who are not entitled to asylum are not to remain within the European Union.

10. Article 3 deals with what are described as under Chapter 2 general principles and safeguards and access to the procedure question, but Article 4 provides for a right of information and that is of some importance because it requires by paragraph 1 as soon as an application for international protection is lodged in a Member State, its competent authority should inform the applicant of the application of this Regulation and in particular of:-

    (a) the objectives of the Regulation and the consequences of making another application in a different Member State as well as the consequences of moving from one Member State to another and so on;

    (b) the criteria for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration, including the fact that an application for international protection lodged in one Member State can result in that Member State becoming responsible in this Regulation, even if such responsibility is not based on those criteria;

    (c) deals with personal interview;

    (d) with the possibility to challenge and to apply for a suspension where applicable;

    (e) the fact that there is data exchange between Member States; and

    (f) the right of access to data.

11. The purpose behind the giving of that information is to enable the individual to put forward any matters that may be relevant to whether there should be a transfer under Dublin III. There is also, as will become clear, an obligation to provide that there be a right to have recourse to legal representation in order that the rights of the individual can be protected.

12. Article 17 is headed "Discretionary Clauses" and it provides:-

> "1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation"

and if the Member State in question does decide it becomes the responsible Member State.

13. Paragraph 2 of Article 17 provides:

> "2. The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible ...".

14. Albeit that does not directly apply, it is important in my view because it indicates the sort of matters that are material in deciding whether Article 17 should be applied. That is equally recognised by paragraph 17 of the preamble which provides:-

> "Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation."

15. The important aspect, apart from humanitarian, is to bring together family members, relatives or other family relations. That is not exclusive because paragraph 17 of the preamble uses the words "in particular". 'Humanitarian' would tend to cover Articles of the Human Rights Convention, although it is not necessarily so limited, and "compassionate" clearly has the possibly of a wider consideration, but the

purpose behind Article 17 as has been made clear by the Luxembourg Court is to enable Member States to exercise their right to make a decision to deal with a particular case, notwithstanding that there is no obligation under the Regulation to do so. The basis upon which they act is entirely a matter for their discretion. That is, in my judgement, of very considerable importance because it is difficult to imagine that there is likely to be any case other than the most exceptional circumstances where if the transfer decision was not subject to any bar on the basis of a failure to activate properly the hierarchical criteria or because of a breach of human rights, where a failure to exercise the Article 17 power would be regarded as reviewable. I put it that way, although it is always reviewable in a sense that there is jurisdiction to entertain a claim for a failure to apply Article 17. So much is clear from the case of ZT [2016] 1 WLR 4894 but it seems to me that it would be difficult absent some very strong compassionate circumstances or the family aspect which is specifically referred to in the preamble that a court would entertain such a claim.

16. In relation to a challenge to that exercise of discretion the matter falls, it seems to me, clearly within the Wednesbury umbrella, and it is only if it can be said that the decision of the Secretary of State not to apply Article 17 was unlawful within the Wednesbury test that such a claim could succeed.

17. I turn now to Article 27. This provides under the heading "Remedies":-

> "1. The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal."

18. In this country the right is a right of review, there is no right of appeal, and the question as I say that was raised by Judge Freeman is one that is, with respect, easily answered, and I have already answered it. It is to be noted that the information given to those who claim asylum and whose cases are under Dublin III consideration include this under the heading "How is the country responsible for my application decided?" It goes on:-

"The law sets out various reasons why a country may be responsible for examining your request. For these reasons it is considered in the order of importance by the law starting from whether you have a family member present in that Dublin country, whether you now or in the past have had a visa or a residence permit issued by a Dublin country, or whether you have travelled to or through another Dublin country, either legally or irregularly. It is important that you inform us as soon as possible if you have family members in another Dublin country. If your husband, wife or child is an applicant for asylum or has been granted international protection in another Dublin country, that country could be responsible for examining your asylum application. We may decide to examine your application in this country, even if such examination is not our responsibility under the criteria laid down in the Dublin Regulation. We will not send you to a country where it is established that your human rights could be violated."

19. It is clear in my judgement from that, that those responsible recognise the power under Article 17, recognise the importance of the family member point, which again is highlighted in the passages which I have just cited, and a recognition that no-one would be sent back to a country where it is established that human rights could be violated.

20. So far as rights of appeal are concerned, or rights rather to challenge are concerned, the document provided to the individual in question has a page which is headed "What if I disagree with the decision to send me to another country?" It says:-

"You have the possibility to say that you disagree with the decision to send you to another governing country. This is called an appeal or review. You will also ask for a suspension of the transfer for the duration of the appeal or review. You can find information on which authority to contact in order to challenge a decision in this country at the end of this leaflet. When you received the official transfer decision from the authorities you had x days to make an appeal (and then the words to the name of the appeal authority are crossed out. Of course,

there is no such right of appeal). It is very important that you challenge the appeal or view within the indicated time ..."

and then there is a reference to suspension provisions under Article 17(3).

21. I questioned whether there had been a suspension because the normal limit for return absent a provision which enables further time to elapse is six months and that of course is long gone.

22. Article 29 deals with questions of timing and that provides, as I have said, that return must be within six months of the acceptance of a request by another Member State to take back the person concerned, or the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3). 27(3) is not entirely easy to construe. It states for the purposes of appeals against or reviews of a transfer decision Member States shall provide in their national law that:-

(a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or

(b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time (that is the period of appeal or review); or

(c) the person concerned has the opportunity to request within a reasonable period of time suspension.

23. The way that is drafted in my view makes it plain that if the Member State provides the right to remain, that operates as a suspension, because otherwise there would be no need for the alternatives which deal specifically with a power to suspend. It is the practice in this country, as I understand it, that those who challenge by way of review a Dublin transfer decision do have the right to remain, and it seems to me that that, in the circumstances, properly operates as a suspension.

24. The European Court of Justice has had to consider aspects of Dublin III recently. One of the most recent cases is Ghezelbash v Staatssecretaris van Veiligheid en Justitie (a Dutch authority) [2016] 1 WLR 3969. The question before the court was whether the

challenge to the hierarchical criteria could be made before the domestic court and the decision was clearly that it could, and what the court decided was helpfully indicated by this approach in paragraph 53 where it said:-

> "A restrictive interpretation of the scope of the remedy provided in Article 27(1) of Regulation No 604/2013 might, inter alia, thwart the attainment of that objective by depriving the other rights conferred on asylum seekers by that Regulation of any practical effect. Thus, the requirements laid down in Article 5 of the Regulation to give asylum seekers the opportunity to provide information to facilitate the correct application of the criteria for determining responsibility laid down by the Regulation and to ensure that such persons are given access to written summaries of interviews prepared for that purpose would be in danger of being deprived of any practical effect if it were not possible for an incorrect application of those criteria — failing, for example, to take account of the information provided by the asylum seeker — to be subject to judicial scrutiny."

25. And then the question of delay was referred to and in paragraph 57 it was said that there was no intention that judicial protection to be enjoyed by an asylum seeker should be sacrificed to the requirement of expedition, but it went on in 58:-

> "58.It should be observed in that regard that the risk that the conclusion of the procedure for the determination of the Member State responsible may be excessively delayed as a result of the scrutiny of the correct application of the criteria for determining responsibility is limited by the fact that such scrutiny must be carried out within the framework established by Regulation No 604/2013, in particular Article 22(4) and (5), which provides (i) that the requirement of proof should not exceed what is necessary for the proper application of the regulation and (ii) that if there is no formal proof, the responsibility of the requested Member State should be acknowledged if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish its responsibility.

59. Moreover, as regards the risk of delay in implementing transfer decisions, it is apparent from Article 27(3)(c) of Regulation No 604/2013 that, by specifying that the Member States are to provide that 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, the EU legislature acknowledges that the Member States may decide that the lodging of an appeal against a transfer decision does not, of itself, have suspensory effect with regard to the transfer, which may therefore go ahead without waiting for the examination of the appeal, provided that suspension has not been requested or the request for suspension has been refused."

That can apply if there is no right to remain which itself, as I have said, must in accordance with what seems to me the clear language of 27(3) provide for an automatic suspension.

26. It is also to be noted that in the case CK v The Republic of Slovenia the court decided, the case being KC/578/16, that the application of Article 17(1) was a question which concerned the application of European law, but it could mean that there was a requirement to exercise it in any particular circumstances, even if the circumstances meant in a given case that there was going to be a problem on human rights grounds of return. The case in question was a medical case.

27. It seems to me in those circumstances that it is clear that Article 17 is not a matter which is directly material in the right of review to be exercised under Article 27. If there is a lawful, proper transfer decision made because there is no reason against under either human rights grounds or a failure to comply properly with the provisions of the Regulation, then it is of course open to the Secretary of State to decide nonetheless to deal with the matter, but she is well-aware of that, as the document that I referred to makes clear, and the failure to do so if there is no breach of any of the procedures does not mean that it is appropriate to consider that issue on an Article 27 review. It is of course open, as I have said, for an application to be

made specifically for that to be considered, but I suspect that if otherwise the return was a proper one and there are no family considerations against it, it would be rare to say the least, that a court would grant permission.

28. Accordingly, so far as the matter directly before me is concerned, what I have just said will be the decision that I make for the reasons that I have given.

29. I refuse permission on the remaining issues.

Costs

30. No order for costs save for the usual Legal Aid order.~~~~*0*~~~~