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Judgment

Title:	M.I.F. -v- International Protection Appeals Tribunal & ors
Neutral Citation:	[2018] IECA 36
Court of Appeal Record Number:	2017 244
High Court Record Number:	2017 365 JR
Date of Delivery:	19/02/2018
Court:	Court of Appeal
Composition of Court:	Irvine J., Hogan J., Whelan J.
Judgment by:	Hogan J.
Status:	Approved
Result:	Dismiss

THE COURT OF APPEAL

Irvine J.
Hogan J.
Whelan J.

Neutral Citation Number: [2018] IECA 36

Record No. 2017/244

BETWEEN

M.I.F.

APPELLANT

- AND -

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 19th day of February 2018

1. The issue raised in this appeal is essentially whether an asylum seeker enjoy a right under Article 31 of the Geneva Convention Relating to the Status of Refugees (1951) to choose the country in which he will make an application for asylum and, if so, are the provisions of Regulation (EU) 604/2013 ("the Dublin III Regulation") invalid on this account? In her *ex tempore* ruling delivered in the High Court on the 24th July 2017 O'Regan J. refused to grant the applicant leave to apply for judicial review to argue this particular ground (while granting leave on other grounds), *citing for this purpose an earlier decision of hers in M*.A.H. v. International Protection Tribunal [2017] IEHC 462 where she had stated that "the element of choice afforded by the Geneva Convention as asserted by the applicant is unreasonably overstated."

2. The applicant has now appealed to this Court. During the course of the appeal we were informed that there are upwards of one hundred similar cases pending in the High Court and which are awaiting the outcome of this appeal. Even allowing for the fact that this application is governed by the lower threshold of arguability governing ordinary applications for leave to apply for judicial review which is to be found in the judgment of the Supreme Court in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 349, for my part I do not consider that it can plausibly be argued that the Dublin III Regulation is invalid on this account.

The background to the present application

3. Before explaining why I reach this conclusion, it is necessary first to sketch out the background facts to this appeal. On the 30th April 2015, the applicant, Mr. F. made an application for asylum in the State. Mr. F., a Pakistani national, was interviewed pursuant to s. 8 of the Refugee Act 1996 (as amended)("the 1996 Act") on the 15th May 2015. On the 18th May 2015 an information request (including his fingerprints) was sent pursuant to Article 34 of EU Regulation 604/2013 to the United Kingdom. It ultimately transpired that the applicant's fingerprints were present in the records of the UK authorities. As it happens, Mr. F. had lived in the U.K. from April 2011 to September 2013. He claims that an incident occurred in Pakistan in October 2013 which forms the basis of his application for asylum. He returned to the U.K. in November 2013 but travelled to the State in April 2015. He had not sought asylum at any time in the U.K.

4. A "take charge" request was issued to the U.K. authorities on the 27th October 2015 and the U.K. agreed that it would accept the transfer of Mr. F. pursuant to Article 12(4) of the Dublin III Regulation. The Refugee Applications Commissioner (the predecessor to the present respondent) notified the applicant on the 16th March 2016 that it had decided that the U.K. was responsible for processing the applicant's claim for international protection. On the 8th April 2016 the applicant appealed the decision of the Refugee Applications Commissioner and, following an oral hearing before the International Protection Appeals Tribunal on the 29th March 2017, the applicant's appeal was rejected by decision of the 11th April 2017. It is the latter decision which is challenged in these judicial review proceedings.

5. Leave to apply for judicial review was granted by O'Regan J. in respect of all reliefs claimed, save two, which were refused. The two reliefs sought at No. 6 and No. 7 of the

applicant's grounding statement were in the following terms:

> "6. A declaration by way of application for judicial review that Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26th June 2013 ["the Dublin III Regulation"] establishing 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 (recast) is invalid.
>
> 7. A declaration that an applicant for international protection is entitled to choose the State or Country in which to apply for international protection."

6. In effect, therefore, Mr. F. contends that the Geneva Convention gives him the right to choose Ireland as the State in which he will make his request for asylum and that insofar as the Dublin III Regulation provides that he must make it first in the U.K., it is to that extent invalid.

The relevant Treaty and Legislative Provisions

7. It is next necessary to consider the relevant Treaty and legislative provisions upon which Mr. F. relies. They are as follows: First, recital 40 of the Dublin III Regulation states that:

> "the establishment of 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......."

8. Second, Article 18 of the Charter of Fundamental Rights of the European Union states:

> "The right to asylum shall be guaranteed *with due respect for the rules of the Geneva Convention* of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community." (emphasis added).

9. Third, the relevant recitals to the Geneva Convention provide respectively:

> "CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international co-operation. EXPRESSING the wish that all States, recognising the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States."

10. Fourth, Article 31 of the Geneva Convention provides protection to refugees from prosecution and the imposition of penalties by reason of the illegal entry or presence in the host state, including by reason of the possession of false documents. Article 31 provides:

> "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The

Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

11. Fifth, Article 78 of the TFEU states:

"1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

(c) a common system of temporary protection for displaced persons in the event of a massive inflow;

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the member State(s) concerned. It shall act after consulting the European Parliament". (Emphasis added).

The argument advanced by Mr. F. in the present appeal

12. At the heart of Mr.F.'s argument lies two fundamental propositions, namely, first, that the terms of the Geneva Convention must be afforded supremacy in all respects so that in the case of any inconsistency it should prevail over any provisions of E.U. law providing to the contrary and, second, Article 31 the Geneva Convention entitles an applicant to choose the country in which to apply for asylum. As the Dublin III Regulations takes away and curtails that right to choose, it is said, accordingly, that it is

to that extent thereby invalid and incompatible with the Charter and the TFEU.

13. As an aside, it bears observing in the first instance that this Court has in fact no jurisdiction to declare a European Union legislative measure such as a Regulation to be invalid, since this is a function which is reserved exclusively to the Court of Justice. If, however, this Court were of the view that a serious issue had been raised as to the validity of the Regulations, then it would have been obliged to refer that question of validity to the Court of Justice pursuant to Article 267 TFEU: see Case 341/85 *Foto-Frost* [1987] ECR 4199. Since, to repeat, I do not think that any such issue can be said to arise in the present appeal, the *Foto-Frost* obligation simply does not arise for consideration.

Article 31 of the Geneva Convention

14. The first issue is what the obligations of a Contracting State under the Geneva Convention actually are. Particular emphasis has been placed by the applicant on the provisions of Article 31(2) of the Convention which expressly envisage that Contracting States will permit refugee applicants "to obtain admission into another country" and, furthermore, that they "shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

15. I am prepared to allow that there may well be instances where the drafters of 1951 Convention envisaged that a refugee would have to be given facilities to enable him to travel from Country A to Country B. It has to be recalled that the Geneva Convention originally applied only to the protection of European refugees before the 1st January 1951. These temporal and geographic restrictions were removed only by the Protocol of 1967.

16. In the immediate aftermath of the Second World War there were quite obviously many, many instances of where European refugees arrived in one country for transit purposes with the intention to moving to another destination. A common example was that of displaced persons transiting through Austria on their way to the newly established Federal Republic of Germany. Commercial air travel was still in its infancy at the time and the vast majority of such refugees travelled by train or road. Just as importantly, many European countries operated visa restrictions on intra-country travel. These visa requirements were only gradually relaxed throughout the 1950s after the Convention had been concluded.

17. By the 1970s the era of free movement within the European Economic Community – a concept which, in 1951, was but a glint in the eye of Schuman and others - had arrived. This was later supplemented by the Schengen system from the late 1980s and the completion of the internal market in 1992.

18. Side by side with this the system of refugee protection itself had subtly changed. What was over time to prove to be the most significant change of all occurred in 1967 when the Protocol applied the Geneva Convention to all the world's refugees and not just (as was the case prior to that date) to post-war European refugees. Ease of movement by air, the post-war stabilisation of Europe, the growth of prosperity within the Europe, the collapse of the Berlin wall and the proliferation of regional conflicts all lead to a huge increase in the volume of refugee applications. Many refugee applicants travelled from one European county to another, making multiple applications for asylum in the process, with the consequential potential for overlapping and, in not a few instances, abusive applications. This led to the Dublin Convention of 1990 which sought to standardise and rationalise the asylum system within the European Union (as the European Union later became).

19. Over time and with the entry into force of the Amsterdam Treaty, the Dublin Convention system evolved from a system of inter-governmental, Convention-based

system co-operation via the first instance, to the developed and highly synchronised system of E.U. law between the Member States which is now the Dublin III Regulation. Any analysis of the import of Article 31 of the Convention has to take account of these realities

20. As the British case-law – on which the applicant relies and which I will shortly examine – illustrates, the protections contained in Article 31 of the Geneva Convention were, however, fundamentally designed to protect refugees travelling on false papers from criminal prosecution as they sought to transit to another county.

21. In the first of these cases, *R. v. Uxbridge Magistrates' Court, ex p. Adimi* [2001] 1 Q.B. 667 concerned the propriety of criminal prosecutions again a number of refugee applicant who had been prosecuted for travelling to, or attempting to travel from, the UK on false papers. Mr. Adimi was an Algerian arrived in the U.K. on a flight from France having first arrived in Italy some ten days later. The other applicants, a Mr. Sorani and a Mr. Kaziu, were an Iraqi Kurd and an Albanian respectively. Their defence was that they were simply transiting through the U.K. on their way to claim asylum status in Canada.

22. Simon Brown L.J. rejected the argument advanced by the respondents to the effect that the word "coming directly" in Article 31 of the Geneva Convention mean that asylum seekers enjoyed no element of choice in respect of where they sought asylum ([2001] 1 Q.B. 667, 678):

> "In short it is the respondents' contention that Article 31 allows the refugee no element of choice as to where he should claim asylum. He must claim it where first he may: only considerations of continuing safety would justify impunity for further travel. For my part, I would reject this argument. Rather I am persuaded by the applicants' contrary submission, drawing, as it does on the travaux prÃ©paratoires, various conclusions adopted by the UNHCR's executive committee (ExCom), and the writings of well-respected academics and commentators (most notably Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis), that *some element of choice is indeed open to refugees as to where they may properly claim asylum*. I conclude that any merely short-term stopover *en route* to such intended sanctuary cannot forfeit the protection of the article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing." (emphasis supplied)

23. The decision in *Adimi* was subsequently considered by the House of Lords in *R. v. Asfaw* [2008] UKHL 31, [2008] 1 AC 1061 where the essential facts were rather similar. In *Asfaw* the applicant was an Ethiopian national who had travelled to the U.K. on false papers. She was then arrested while in transit at Heathrow Airport as she attempted to board a flight to the US using a false Italian passport. The House of Lords held that in the circumstances the prosecution of the applicant for forgery amounted to an abuse of process. Following a review of the history of the Convention, the *travaux prÃ©paratoires* and the relevant academic literature, Lord Bingham approved of the decision in *Adimi* and concluded that Article 31 of the Geneva Convention served to protect these defendants from prosecution. He quoted from Goodwin-Gill (*Refugee Protection in International Law* at p. 194) who in turn had described Simon Brown LJ's judgment in *Adimi* as (p 203) "one of the most thorough examinations of the scope of Article 31 and the protection due". Goodwin-Gill drew on an extensive survey of state practice before concluding (at p. 218):

> "Refugees are not required to have come directly from their country of origin. Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection in the first country or countries to which they flee, or who have 'good cause' for not applying in such country or countries."

24. Lord Bingham then concluded ([2008] 1 AC 1061, 1084):

> "On 14 February 2005, when the appellant presented a false Italian passport…at the check-in desk she was a refugee within the Convention definition, as accepted at the criminal trial and now recognised by the Secretary of State. It has never been questioned, despite her brief stopover somewhere in the Middle East, that she was coming directly from the country where she had been persecuted. The jury accepted that she had, when challenged, presented herself to the authorities and that she had good cause for resorting to forgery and deception in the course of her flight from persecution. It seems to me that *Adimi* is fully supported by such authority as there is, both before and since, and was rightly decided. The UNHCR, who has intervened in this appeal and made most valuable submissions, strongly so submits. On the facts of this case, as now established, the appellant should not in my opinion, consistently with Article 31, have been subjected to any criminal penalty on either count of the indictment preferred against her."

25. This, however, is as far as the Geneva Convention goes: it protects refugees from prosecution in the case of the use of false papers used in the course of flight and, in the words of Simon Brown L.J. in *Adimi*, it gives a certain freedom of choice to the asylum seeker as to which country he will make a claim for status in the course of departing from the country to which he has been suffering oppression or persecution. But these words should not, I think, be over-interpreted or taken out of context. In particular, the applicants in *Adimi* were not subject to the Dublin Convention (the precursor to the present Dublin III Regulation). As Goodwin-Gill, *The Refugee in International Law* (3rd. ed.)(2007)(at para. 3.3.5) states:

> "..in *Adimi*, Simon Brown L.J. found that refugees have 'some element of choice' as to where to claim asylum….International law does not impose a duty on the asylum seeker to lodge a protection claim at any particular stage of flight. On the other hand, domestic law may preclude asylum seekers from lodging an asylum claim if they have transited through other 'safe' countries."

26. Nor could these words in *Adimi* be interpreted as meaning that an applicant such as Mr. F. who had actually lived in the U.K. for the best part of eighteen months after the incident which was said to form the basis of the asylum application could then elect to travel to this State and make an asylum application here. Save, perhaps, in the special case of persons who become refugees *sur place*, this was never envisaged by the Geneva Convention. After all, Article 31 of the Convention is concerned with refugees coming "directly" from the territory in which they faced persecution. While it is clear that, as in *Asfaw*, short-term stop-overs or a change of airplane while in transit or even, as in *Adimi* ,a delay of ten days in getting from Italy through France to the U.K., does not in itself debar refugees from asserting Geneva Convention rights, a sojourn of eighteen months (such as occurred in the present case) in another safe country such as United Kingdom is an entirely different matter.

27. While this is in itself would be sufficient to dispose of the applicant's claim, there is another even more fundamental issue. The principles contained in the Geneva Convention are, admittedly, highly significant in European Union law, but the Convention itself does not form part of EU Law and still less does it enjoy some supreme status within the E.U. legal order such that even a Treaty provision might be held to be in effect invalid when judged by reference to it.

28. Article 18 of the Charter of Fundamental Rights of the European Union guarantees

the right to asylum "with *due respect* for the rules of the Geneva Convention". (emphasis added). In other words, it clear that whereas the substance of the rights to seek asylum guaranteed by the Convention must be respected, the Charter does not envisage that the detailed requirements of the Convention must be adhered to in every single particular. Specifically, allowance must necessarily be made for the burden-sharing provisions and Member State allocation systems envisaged in the case of asylum seekers by Article 78 TFEU, together the development of a common policy on asylum including determining which Member State is responsible for considering an application for asylum.

29. At this point it may be convenient to repeat the language of Article 78 TFEU which provides in relevant part:

> "1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be *in accordance* with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
>
> 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:…
>
> > (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection. …"(emphasis added).

30. All of this is further reflected in the relevant recitals to the Dublin III Regulation. Recital 3 stated that "the European Council has agreed that it will work towards establishing the Common European Asylum System ["CEAS"] based on the full and inclusive application of the Geneva Convention" and recital 4 provides that "… the CEAS should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an asylum application." To that extent, the Dublin III Regulations builds on and supplements the scheme envisaged by the Geneva Convention which, to repeat, was negotiated at a time when the existence of multi-state regional organisations with its own developed legal system and unique personality in international law such as the European Union simply did not exist.

31. As Article 3(1) of the Dublin III Regulations makes this clear:

> "1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.
>
> 2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it. Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that

> Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.
>
> 3. Any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU."

32. The rest of the Regulation contains jurisdiction-allocation rules as between the Member States, including special rules for minors (Article 8) and refugees joining other family members (Article 9 and Article 10). The application of the Dublin III Regulation does not in any sense amount to a penalty imposed by reason of the illegal entry of a refugee into a Member State of the kind prohibited by Article 31(2) of the Geneva Convention. It rather amounts instead to the division of responsibility between the Member States for the consideration and determination of applications of refugee status, applying the principles set out in the Qualifications Directive (Directive 2013/32/EU).

33. As Lord Rodger observed in *Asfaw* ([2008] 1 AC 1061, 1110):

> "Nothing in the Convention gives refugees the right to choose where to seek asylum. Mr. Fordham emphasised that point on behalf of the [UN] High Commissioner [for Refugees]. Indeed, the Dublin Convention only works because that is the position. It contains an elaborate system for deciding which Member State of the European Community should examine the application of an alien for asylum. With a minor exception in Article 9 [dealing with family unification], that Convention treats the wishes of the applicant as irrelevant."

34. While Lord Rodger was admittedly in dissent, it was not in respect of this issue.

35. In any event, Article 3(2) of the Dublin III Regulation further provides that if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in a particular Member State, such where there is a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, that Member State in question will no longer be deemed to be the responsible State. In those circumstances the refugee will be entitled to insist that his application for asylum is dealt with in the Member State here he is currently physically present rather being transferred to the other Member State in accordance with the Dublin III Regulation: see, e.g., C-578/16 *PPU CK v. France* EU:C: 2017: 127 (at para. 65) and C-490/16 *A.S. v. Slovenia* EU:C: 2017: 127 (at para. 41).

36. All of this is to say that as Article 78(2)(e) TFEU expressly provides for this system of jurisdiction allocation as between the Member States in respect of asylum applications, it could not be said that the Dublin III Regulation is in some way invalid by reference to E.U. law.

Conclusions

37. While it is true that Article 31 of the Geneva Convention confers some element of choice to those seeking refugee status as to the country in which they will make their application for status, that choice is, nevertheless, one which is largely confined. The choice in question is really confined to those applicants who are *en route* to a particular

destination and whose choice of country of refuge is not nullified simply because they did not make an application in a Contracting State where they were simply stopping over or transiting. In particular, Article 31 does not give refugee applicants an open-ended choice of the kind apparently claimed by Mr. F. in the present case.

38. Within the context of the European Union, Article 31 of the Geneva Convention is, in any event, supplemented and developed by the existence of a multi-lateral agreement between the Member States of the Union reflected in the Dublin III Regulation which provides for a system of jurisdiction allocation between these Member States which is designed to avoid forum shopping and potentially abusive applications in a multiplicity of States. This system of regulation is, moreover, expressly contemplated by Article 78(2)(e) TFEU. It cannot be said that a system expressly authorised by the Treaties could in itself be unlawful on the ground that it is contrary to an international treaty (such as the Geneva Convention) which, in any event, is not in *itself* part of the law of the European Union.

39. In summary, therefore, because I do not think that the present case reaches even the threshold of arguability required in leave applications of this kind, I consider that the ruling of O'Regan J. regarding these grounds and reliefs (reliefs nos. 6 and 7) in respect of which she refused leave was correct and that the present appeal should, accordingly, be dismissed.

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