High Court of Ireland Decisions

Judgment

Title: Z.S. v The Refugee Appeals Tribunal & ors

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Judgmentby: Faherty J.

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[2018] IEHC 436

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 294 J.R.]

BETWEEN

Z. S.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

AND

THE REFUGEE APPLICATIONS COMMISSIONER

NOTICE PARTY

JUDGMENT of Ms. Justice Faherty delivered on the 27th day of June, 2018

1. On 9th May, 2016, by Order of the High Court (Faherty J.), the applicant was granted leave to apply for judicial review to seek,*inter alia*, of an order of*certiorari*quashing the

decision of the first named respondent, the Refugee Appeals Tribunal (hereinafter "the Tribunal") dated 8th April, 2016, that the applicant be transferred to the UK for the purpose of assessing his asylum claim.

2. The background to the within application is as follows: the applicant is a Pakistani national who made a claim for asylum to the Offices of the Refugee Applications Commissioner (ORAC) on 16th June, 2015. He claimed that he would be persecuted if returned to Pakistan. He was interviewed pursuant to s. 8 of the Refugee Act 1996 ("the 1996 Act") on 25th June, 2015. He completed an asylum questionnaire on 6th July, 2015.

3. On 16th June, 2015, ORAC obtained a Eurodac hit in respect of the applicant which linked him to a prior asylum claim made in the UK. The applicant was interviewed by ORAC pursuant to Regulation 5 of the Dublin III Regulations on 25th June, 2015. On 15th July, 2015, ORAC sent a "take back" request to the UK in relation to the applicant's asylum claim, advising,*inter alia*, as follows:

> "When interviewed, the applicant stated he didn't claim asylum in the UK. Applicant stated he arrived in Ireland from the UK on 16/06/2015. Applicant stated he travelled to Belfast by ferry from Scotland and travelled from Belfast to Dublin by car.
>
> There is no material evidence to suggest that the applicant left the territory of the Member States since the date of his asylum application in the UK."

4. The process upon which ORAC initiated contact with the UK is contained in Article 23 of the Dublin III Regulation as follows:

> "Article 23
>
> **Submitting a take back request when a new application has been lodged in the requesting Member State**
> 1. Where a Member State with which a person as referred to in Article 18(1)(b), (c) or (d) has lodged a new application for international protection considers that another Member State is responsible in accordance with Article 20(5) and Article 18(1)(b), (c) or (d), it may request that other Member State to take back that person.
>
> 2. A take back request shall be made as quickly as possible and in any event within two months of receiving the Eurodac hit, pursuant to Article 9(5) of Regulation (EU) No 603/2013.

If the take back request is based on evidence other than data obtained from the Eurodac system, it shall be sent to the requested Member State within three months of the date on which the application for international protection was lodged within the meaning of Article 20(2).

> 3. Where the take back request is not made within the periods laid down in paragraph 2, responsibility for examining the application for international protection shall lie with the Member State in which the new application was lodged.
>
> 4. A take back request shall be made using a standard form and shall include proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the statements of the person concerned, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid

down in this Regulation.

The Commission shall, by means of implementing acts, adopt uniform conditions for the preparation and submission of take back requests. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2)."

5. Article 25 of the Regulation provides that the requested Member State:

"shall make the necessary checks and shall give a decision on the request to take back the person concerned as quickly as possible and in any event no later than one month from the date on which the request was received. When the request is based on data obtained from the Eurodac system, the time limit shall be reduced to two weeks."

6. On 29th July, 2015, the UK authorities responded to the request advising as follows:

> "According to United Kingdom immigration records the above named was last known to be in the United Kingdom in 2013. He has since breached his reporting instructions and his whereabouts are unknown.
>
> In order therefore for the United Kingdom to consider whether it remains responsible for the subject under the Dublin III Regulation, we require comprehensive details of the subject's stated whereabouts and movements between 2013 and his application in Ireland. Pending the above information, your request is respectively denied."

7. On 18th August, 2015, ORAC wrote to the UK authorities advising,*inter alia*, as follows:

> "The applicant has not provided any evidence or documents in support of his claimed journey to Ireland or any documents in support (sic) his claim.
>
> In his initial interview, the applicant stated that he never applied for asylum in any other country before. During his Article 5 [personal interview], when informed that he had been fingerprinted in the UK on 20/08/2013, the applicant denied having applied for asylum in the UK. He stated he left the UK by ferry, from Scotland to Belfast, arriving in Belfast on 16/06/2005, and on the same date, he stated that he travelled to Dublin by car. The applicant was asked if he had returned to his country of origin, since he was fingerprinted in the UK and he replied, "No".
>
> The applicant stated that he has no family in Ireland. He stated that he has a cousin in London … and a cousin in Birmingham …
>
> As there is no material evidence to suggest that the applicant left the territories of the Member States following his applicant for asylum in the UK, as per EURODAC search results with the UK, it is considered, based on the evidence available, that the UK is the Member State responsible for the asylum application of the applicant."

On the same date, the UK authorities replied:

> "I am writing to advise you that the United Kingdom has reconsidered your request to take back the above named under the terms of Council Regulation (EU) No. 604/2013 of 26th June, 2013.
>
> Following further examination of the details of the case and your letter of 18th August, 2015 the United Kingdom will now accept the transfer of the

above named for the further consideration of their application for international protection under the terms of Article 18.1(b)."

8. By decision dated 28th August, 2015, the Refugee Applications Commission (the "Commissioner") decided that the applicant's asylum claim was one for which the UK bore responsibility as it was the first Member State in which an application for international protection had been lodged by the applicant.

9. The Commissioner's transfer decision was appealed by the applicant to the Tribunal on 15th September, 2015. The grounds of appeal included the plea that the take back request was not completed within the period specified by Article 23(2) of the Dublin III Regulation.

10. On 8th April, 2016, the Tribunal affirmed the Commissioner's determination. This was communicated to the applicant's solicitor on 14th April, 2016. In relevant part, the Tribunal's decision reads as follows:

> "Article 23(2)
>
> [5.1] The 'take back' quest of 15th July 2015 was made just under one month after the Eurodac hit. Therefore, the Tribunal finds that the time limits laid down in Article 23(2) were complied with.
>
> [5.2] The response of the UK authorities of 29th July, 2015 is phased as a denial of the request. However, it is not a final denial of the request and the Tribunal finds that the response is, in substance, a request for further information before a final decision is made in relation to the request.
>
> [5.3] The reply of the Irish authorities on 18th August 2015 is, essentially, a reiteration of information provided as part of the request of 15th July, 2015. The UK ultimately accepted the 'take back' request on 18th August 2015.
>
> [5.4] In conclusion, the Tribunal takes the view that the 'take back' request of 15th July 2015 was made within time and was not invalidated by subsequent events. It follows that the relevant grounds of appeal are not upheld."

11. The grounds upon which leave was granted are set out at paragraph 5(a), (b) and (c) of the statement of grounds. In the course of the within hearing, it was confirmed that the applicant was advancing only with Ground 5(a) which states:

> "The first named respondent erred in fact and law and misapplied the provisions of the Dublin III Regulation in breach of the Applicant's rights, or acted unreasonably or irrationally … in concluding that the provisions of Article 23 of Regulation 604/2013 ("the Dublin III Regulation") were complied with by the Notice Party in the applicant's case. The Applicant will rely in this regard on the following alternate grounds:
>
> > i. The take back request of the 15th July was spent by reason of the non-acceptance of the request by the UK on the 29th July, 2015.
> >
> > ii. If it was open to the Notice Party to supplement the content of the take back request after it was denied by the UK, the time limit for supplemental information to be sent had expired when the

supplemental information was actually sent.

iii. The letter of the Notice Party of the 18th August is void and of no effect as it was not made on the standard form for a take back request, or within the time limits provided for by reference to Article 23 of the Dublin III Regulation.

iv. The correspondence of ORAC, the Notice Party, of the 18th August was mischaracterised by the First Named Respondent as a "reiteration of information provided as part of the request of 15th July, 2015". The correspondence was material to the acceptance by the UK of the request to take back the Applicant.

v. The First Named Respondent did not have any evidence before it from the Notice Party to meet the complaint of the applicant in his appeal that the intervals of time between either the receipt of the Eurodac hit and the request of the 15th July 2015 and/or the interval in time between the denial of the request of the 29th July 2015 and the request to re-examine sent on the 18th August 2015, were not in compliance with the obligation under Article 23(2) to send a request "as quickly as possible". As such, the Tribunal was obliged to uphold – or at least, consider – the complaint of the Applicant. In particular, all of the evidence relied upon by the Notice Party in its correspondence of the 18th August 2015 was already in its possession at the time of the take back request."

12. In their statement of opposition, the respondents deny the applicant's claim that the Tribunal's decision was flawed or that the Tribunal mischaracterised ORAC's correspondence, as alleged by the applicant. Without prejudice to this position, the respondents as follows:

> "[The] procedures followed by the Notice Party in respect of the take back request concerning the Applicant were made in accordance with the Dublin III Regulation as implemented by Commission Regulation (EC) 1560/2003. In particular, all steps taken by the Notice Party following the submission of the initial take back request were made in accordance with the provisions of, and time limits provided for, in Article 5(2) of Commission Regulation (EC) 1560/2003."

The applicant's locus standito bring the within challenge

13. In their written and oral submissions, the respondents raise a point of opposition which was neither reflected in the decision of the Tribunal nor pleaded in the Statement of Opposition. They argue that the applicant did not have a right to raise the issue of the take back request, which is the subject matter of the within proceedings. The respondents submit that what the applicant is seeking to do, in the within challenge, is to ask the Court to determine issues which did not affect him.

14. With regard to the*locus standi*issue, the respondent's position is as follows: - the purpose of the Dublin III Regulation is to prevent forum shopping. Albeit that the Dublin III Regulation (unlike the Dublin II Regulation which was an almost entirely administrative enactment) confers on an asylum applicant an entitlement to challenge a breach of the criteria for transfer as is made clear in the*Karim and Ghezelbash*decision as rendered by the ECJ on 7th June, 2016 (*Case C-115/15*and*Case C-63/15*), that does not make it permissible for the applicant to seek to raise issues pertaining to time limits for the requesting and requested Member States to do certain things. These matters are not open to challenge by the applicant.

15. In this regard, the respondents point out that the grounds on which the Tribunal decision is sought to be challenged by the applicant refer solely to the provisions of s. 111 of Ch. VI of the Dublin III Regulations- the procedure for take-back requests. The applicant does not seek to invoke Ch. III of the Dublin III Regulation- the criteria for determining the EU Member State responsible, which, it is submitted, is the only basis of challenge open to him. In aid of their argument that the applicant has no standing to challenge the take back request, the respondents rely on*T.M. v. RAT & Ors*[2016] IEHC 469, where as regards the nature of time limits in the Dublin III Regulation, Humphreys J. held:

> *"41. In any event, in my view, the three month limit is designed to protect the member state on a purposive interpretation and not the applicant.*
>
> *42. In Case C-620/10, Migrationsverket v. Kastrati, Advocate General Trstenjak (in her opinion of 12th January, 2012) stated at para. 28 that the primary purpose of the predecessor regulation (Council Regulation (EC) No. 343/2003 of 18th February, 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national) (the 'Dublin II' regulation) was the determination of the responsible member state and at para. 29 that 'the objective of Regulation No. 343/2003 [Dublin II] is not to create procedural safeguards for asylum seekers in terms of the determination of conditions for the acceptance or rejection of their asylum applications. Rather that Regulation primarily governs the allegation of the duties and tasks of the Member States amongst themselves.*
>
> *43. Similar views were expressed by Advocate General JÃ¤Ã¤skinen in Case C-4/11, Bundesrepublik Deutschland v. Kaveh Puid (18th April, 2013) at para. 58 and by Advocate General Cruz VillalÃ³n in Case C-394/12, Abdullahi v. Bundesasylamt (11th July, 2013).*
>
> *44. To my mind, the consequence of the fact that the bulk of the regulation is addressed to the member states rather than to the protection of applicants as such is that a receiving member state can voluntarily agree to take back an asylum applicant even after the expiry of the periods referred to in the regulation. This is not a breach of any entitlement on the part of an applicant to have an asylum application determined promptly, even if such a right existed, because it is the determination of a purely procedural matter, namely which authority will adjudicate on the asylum claim. If following the expiry of a three-month period from the making of an asylum claim, there was neither a take charge request nor any visible action domestically on the claim, it may be that a legal duty to take one step or the other would arise. But legal duties imposing significant administrative burdens on public bodies cannot reasonably be expected to be put in motion without affording a reasonable time for doing so, in the absence of present circumstances which required immediate action.*
>
> *45. Therefore, even if either request in the present cases was not made 'as quickly as possible', that does not invalidate the transfer if the receiving state is still prepared to take the applicants back. The same position would arise even if the request was made outside the three-month period, providing that the requested state was still willing to act on it. In exercising a sovereign right to transfer charge of an applicant, where this is not strictly required by EU law, it is doubtful whether such a decision is*

reviewable in EU law terms or not, but assuming (which I would not accept) that it is, no uncertainty or conflict in interpretation has been shown such as to render the lawfulness of such a transfer an appropriate matter for reference to the Court of Justice."

He went on to hold, at para: 59:

"The third, and fundamental, misconception is that Ghezelbash and Karim establish a principle that an applicant can challenge a breach of any rule set out in Dublin III. That is incorrect. The applicants can only challenge a breach of the criteria for transfer. Other provisions of the regulation are clearly addressed to member states."

16. Counsel for the respondent asserts that any distinguishing features as between the applicant and the circumstances which pertained in*T.M*. is of no materiality. While it is accepted that the ECJ has not determined the precise scope of an applicant's right to challenge a take-back request, it is submitted the one matter which Humphreys J. found could not be challenged by an applicant was the issue of time limits.

17. Thus, insofar as the applicant seeks in the within judicial review to raise issues pertaining to time limits for the requesting and requested Member States to do certain things, such a challenge was not open to him. It is the respondents' position that if the Court finds that it is not open to the applicant to raise issue of time limits to challenge the Tribunal's decision that disposes of the applicant's case.

18. Counsel for the applicant argues that the Tribunal itself did not raise the issue of the applicant's*locus standi*and in fact dealt with the merits of the applicant's appeal. In those circumstances, it is submitted that the respondents should not be entitled to raise matters not pleaded. In this regard, counsel cites O.84 RSC and*Saleem v. Minister for Justice and Equality*[2011] IEHC 55, where Cooke J. held:

"16. This Court fully agrees with the principle that in the judicial review of decisions of a public authority, all parties to the proceedings owe a duty to the Court to cooperate in pleading so that the issues of law which the court will be required to determine are identified fully and accurately. This Court has on several occasions complained particularly about Statements of Grounds in which very large numbers of vague and unspecific assertions are pleaded and variations of repetitive and overlapping allegations of error of law are advanced…

17. Equivalent considerations apply to the pleading of grounds of opposition. That is not to say that a respondent is not entitled, simply because it is a public authority, to deny all essential elements of the grounds alleged and to put the applicant on proof of all material aspects of the claim. Nevertheless, because in judicial review the High Court is exercising its constitutional and public law function of ensuring that delegated executive decision making powers have been validly exercised in accordance with law, it behoves the respondent to assist the court not only by identifying the issues of fact, if any, which it contests but also by stating frankly and clearly in its pleading, so far as this can reasonably be done, the view or stance it proposes to adopt on the questions of law or issues of interpretation which it considers to be raised by the claim and to require determination by the Court…"

19. It is the applicant's contention that the respondents did not apply to amend the statement of opposition, the Court should not now permit the ground now relied on by the respondent, especially in circumstances where there was no verifying affidavit by the respondents.

20. I note that albeit that counsel for the applicant takes issue with the respondents having raised the issue of the applicant's*locus standi*, she nevertheless was prepared to respond to the substance of the respondents' submissions on the issue and indeed counsel filed supplemental written submissions on this issue prior to the hearing. In those circumstances, and noting that counsel for the applicant had opportunity to prepare a written response to the respondents' argument in advance of the first day of hearing of the within application, the Court was satisfied to permit the respondents to argue the question of the applicant's*locus standi*.

21. As to the substance of the respondents' case, the applicant submits that insofar as the respondents rely on*T.M*. as authority for the proposition that the applicant is not entitled to raise time limits,*T.M*. is entirely distinguishable from the applicant's case as it concerned Article 21 of the Dublin III Regulation (which relate to take charge requests) and not Article 23. Moreover, there was no actual breach of a time limit in*T.M*. Counsel cites the decision of the ECJ in*Karim and Ghezelbash*, in aid of her submission that the Dublin III Regulation does not confine itself to introducing organisational rules simply governing relations between Member States. It is submitted that Ch. VI of the Dublin Regulation has been identified by the ECJ as a basis for applicants being able to challenge the application of the Dublin III Regulation to their cases. In*Ghezelbach*, the ECJ stated:

> *"…the EU legislature did not confine itself, in Regulation no 604/2013, to introducing organisational rules simply governing relations between Member States for the purpose of determining the Member State responsible, but decided to involve asylum seekers in that process by obliging Member States to inform them of the criteria for determining responsibility and to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria, and by conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process"*(at para. 51)

22. It is argued by the applicant that it cannot therefore be said that there is no remedy provided to an applicant in respect of the breach of a time limit.

23. Subsequent to the above submissions of the respective parties, the Court was alerted to a number of developments relevant to the issue of whether the applicant had the requisite*locus standi*to maintain the within proceedings. The first of these was the decision of the Court of Appeal on 14th June, 2017 in*BS & RS v. RAT & Ors*[2017] IECA 179, which touched upon the question of whether the breach of time limits set out in the Dublin 111 Regulation are justiciable by an applicant by reason of an applicant's right to an effective remedy within the meaning of Article 27 of the Dublin 111 Regulation.

24. In his judgment for the Court, Peart J. stated as follows:

> *"74. The appellants accept that the three month outer limit for the take back request was not exceeded. The focus is on the phrase "as quickly as possible" as it is used in Article 21.1. I would not agree with the trial judge that a breach of these time limits in an appropriate case cannot give rise to an individual right of complaint. My earlier remarks concerning Chapter III do not apply to Article 21 since that article appears in Chapter VI. It is in my view certainly arguable, given what is stated in Recital 19 of the Regulation, and the fact that an asylum seeker may well on particular facts be adversely affected and prejudiced by an unreasonable delay in the making of a take back request to a member state responsible, that such an applicant would have an entitlement to complain and to seek a remedy requiring the requesting state to take responsibility for examining the*

application given that delay and prejudice. I refer again to the comments of Advocate General Sharpston in Ghezelbash to which I have referred above in relation to what she called "Option 3" for interpreting the possible scope of the effective remedy in Article 27 by way of appeal/review.

75. Individual rights were certainly extended, or even introduced for the first time under the Dublin III Regulation, beyond the ground of appeal available under the previous Regulation (basically a refoulement-type ground - see Abdullahi (Case C-394/12)). Its predecessor (Dublin II Regulation) contained no equivalent of Article 27. Decisions such as Abdullahi which adopted a narrow interpretation of the scope of appeal or review of a transfer decision have limited relevance to the interpretation of the scope of the effective remedy contemplated by Article 27 of the Dublin III Regulation. While Ghezelbash is perhaps the clearest indication thus far that the Article 27 effective remedy may avail an individual applicant who complains about an excessive and unreasonable delay in the issuing of a take charge request, there does not appear as yet to have been any decision from the CJEU on this precise point . It appears that such a decision is awaited on a preliminary reference application lodged by the Verwaltungsgericht Minden, Germany (Federal Administrative Court) in a case of Mengesteab Case C-670/16 - a reference being currently dealt with under the Court's accelerated procedure."

25. Some six days after the judgment of the Court of Appeal in BS & RS, Advocate General Sharpston rendered her opinion in Case C-670/16*Mengesteab v. Bundesrepublik Deutschland*: She opined:

*"26. The Dublin Implementing Regulation sets out the specific arrangements made to facilitate cooperation between the Member States' authorities responsible for applying the Dublin III Regulation in relation to the transmission and processing of requests for taking charge of, and taking back, applicants for international protection. (25) A standard form for take charge requests is annexed to the Implementing Regulation. The request must include,*inter alia*, a copy of all the proof and circumstantial evidence showing that the requested Member State is responsible for examining the application for international protection and the data relating to a positive Eurodac hit."*

She continued, as follows:

"98. I add that since challenges under Article 27(1) have suspensive effect, the position of the requested Member State is not necessarily prejudiced where a transfer decision is contested. Applicants who make successful challenges are not 'rewarded' as such. A successful challenge means simply that the default position set out in the Dublin III Regulation then applies and the requesting Member State remains responsible for examining the application for international protection.

99. A third objection, put forward both by the United Kingdom and by the Commission, is that a right of appeal or review of a failure to comply with time limits would encourage forum shopping.

100. I am not convinced by that argument.

101.There is no indication that Mr Mengesteab is suspected of having engaged in such activity. Therefore, that particular concern does not arise here. It should also be borne in mind that the Dublin III Regulation contains specific provisions to counter that phenomenon, notably the arrangements for take back requests in Articles 23 to 25. (93) Challenging a transfer decision under Article 21(1) on the ground that the three-month

time limit has passed is a different issue from forum shopping.

102. If an applicant has submitted two applications in two different Member States that would indeed fall within the definition of forum shopping. In such a case the time limits in Article 23 would apply and the competent authorities would be subject to the three-month period laid down. If the time limits are not met, responsibility will then lie with the Member State where the new application is made. However, that consequence flows from the legislative scheme itself, not from the right to appeal or review.

…

107. An examination of the right to an effective remedy under Article 27(1) of the Dublin III Regulation requires that provision to be read together with Article 26(1). The latter imposes an obligation on Member States to notify an applicant of a transfer decision made against him. Article 27(1) both guarantees the right to be heard, which is a right of the defence, and exists in order to provide an effective remedy against erroneous transfer decisions. (99) In the absence of the notification requirements in Article 26(1), Article 27(1) would be unable to fulfil those functions. It follows from the plain wording of Article 27(1) – 'an appeal or a review, in fact and in law' – that the operation of time limits is covered by that provision. Such a reading is consistent with the rights of the defence and the principle of effective judicial protection which are linked as explained by the Court in Kadi II. (100)

108. In the absence of an express exclusion in Article 27(1) as regards the time limits set out in Article 21(1), I consider that it would be contrary to the wording, aims and scheme of the Dublin III Regulation to restrict the right to an effective remedy and access to judicial protection in the way suggested.

109.It is clear that the refugee crisis at the end of 2015 and the beginning of 2016 created an exceptional situation that placed Member States in a difficult, position and strained available resources. (101) However, I do not accept that as a justification for cutting back on the judicial protection afforded by the rules laid down in the Dublin III Regulation.

110. I therefore conclude that Article 27(1) of the Dublin III Regulation, read in the light of recital 19 of that regulation, should be interpreted as meaning that an applicant for international protection is entitled to bring an appeal or review against a transfer decision made as the result of a take charge request where the requesting Member State did not comply with the time limit laid down in Article 21(1) of that regulation when submitting such a request."

26. The ECJ pronounced its decision in Mengesteab on 26th July, 2017. It stated:

"49 …although the application of the Dublin III Regulation is based essentially on the conduct of a process for determining the Member State responsible as designated by the criteria listed in Chapter III of that regulation…it must be stated that that process is an aspect of the take charge and take back procedures which must necessarily be carried out in accordance with the rules laid down, inter alia*, in Chapter VI of that regulation.*

50 As the Advocate General stated in point 72 of her Opinion, those procedures must, in particular, be carried out in compliance with a series of specified time limits.""

27. At para. 62 it opined:

"…Article 27(1) of the Dublin 111 Regulations, read in the light of recital 19 thereof, must be interpreted as meaning that an applicant for international protection may rely, in the context of an action brought against a decision to transfer him, on the expiry of a period laid down in Article 21(1) of that regulation, even if the requested Member State is willing to take charge of that applicant."

28. While*Mengesteab*relates to a take charge request rather than a take back request, I am satisfied that there can be no distinction drawn between the two in terms of justiciability. This, I believe, is clear from the rationale which underlies the opinion of Advocate General Sharpston, especially her conclusion at paragraph 102 of her Opinion, as quoted above. The rationale of*Mengesteab*supports the submission that time limits in Article 23 of the Dublin III Regulation are clearly justiciable and that the consequences for noncompliance with the time limits for a take back request is as dictated by Article 23, namely that if the time limits are not met, responsibility for determining the asylum claim then lies with the Member State where the new application is made.

29. Accordingly, given what is set out by the ECJ in*Mengesteab*(albeit*Mengesteab*concerned a take-charge request), the issue as to the ramifications of non-compliance with time limits is*acte clair*, for the reasons set out by Advocate General Sharpston and the ECJ in*Mengesteab*. In all the circumstances, I am satisfied that the applicant has*locus standi*to maintain the within proceedings.

30. Accepting that the applicant has the requisite*locus standi*to challenge the Tribunal decision on the grounds that the Tribunal erred in failing to find that ORAC did not adhere to the requisite time limits, the question which now arises is whether there is any basis to impugn the Tribunal's decision.

Was the first respondent's decision that the take back request was made within time properly arrived at?

The applicant'ssubmissions

31. The case made on the applicant's behalf is that a "take back" request based upon a Eurodac hit, as in the present case, requires the authorities in the requesting State (ORAC) to make the request "as quickly as possible and in any event within two months of receiving the Eurodac hit". In circumstances in which the Eurodac hit dates to 16th June, 2016, and ORAC's request stood refused by the UK as of 29th July, 2016, it is the applicant's case that the requisite two month limit expired on 16th August, 2016. The essence of the applicant's case is that the Tribunal erred in deciding that the take back request was made within time.

32. It is submitted that the clear consequence of the breach of the obligation of ORAC to send the take back request "as quickly as possible and in any event within two months of receiving the Eurodac hit" is that "the Member State in which the new application was lodged" is responsible for the asylum claim.

33. Counsel contends that the Tribunal appears to assume that ORAC, despite the time limits in Article 23(1) of the Dublin III Regulation, was entitled to send a take back request with insufficient information, and then, once a query is raised by the UK authorities, and that ORAC could then proceed on the basis that it had an indefinite time to complete the take back process set out in Article 23. Counsel states that this is the logical conclusion of the Tribunal's holding that the relevant time limits are to be

calculated by reference to the "take back request" of 15th July, 2015. It is submitted that by 16th August, 2015, the time had expired for ORAC to make any addition to their original request of 15th July, 2015. Accordingly, it was then too late for ORAC to seek to remedy the situation on 18th August, 2016 by sending a letter requesting the UK to change its mind. The first request stood validly refused as of 29th July, 2016. Counsel submits that the scope for any further activity in relation to the matter expired on 16th August, 2015, being two months after the Eurodac hit on 16th June, 2015. Therefore, the exchanges which took place between ORAC and the UK authorities on 18th August, 2015 were out of time.

34. The applicant takes issue with the respondent's reliance on Commission Regulation (EC) 1560/2003 (hereafter "the Implementing Regulation"). Counsel argues that such reliance should not be permitted by the Court as the Tribunal did not cite the Implementing Regulation as a basis for its decision. Counsel contends that the Tribunal did not address or invoke Article 5 of Implementing Regulation as is now sought to be invoked to aid the respondents' case. It is submitted that for Article 5 of Implementing Regulation (if it were relevant) to apply, there would have to have been a negative reply from the requested Member State, which the Tribunal did not find but which, counsel submits, was in fact the case. In fact, the Tribunal found the letter of 29th July, 2015 from the UK authorities to be a letter requesting further information, which, it is submitted, was factually incorrect as the letter constituted a refusal.

35. It is submitted that the applicant only became aware of the possibility that the Tribunal (and/or ORAC) has sought to rely on the Implementing Regulation when the statement of opposition was delivered. As the reasons for the Tribunal decision are to be found in the decision itself, the respondents should not be permitted to give additional reasons or supplant the original reasons when defending the decision on judicial review. It is submitted that for the Tribunal to rely on a ground for the refusal to deal with the applicant's asylum claim which was not advanced in the Tribunal's decision is contrary to the applicant's rights, and the Tribunal's obligations. In this regard, reliance is placed on*EMI v. Data Protection Commissioner*[2013] 2 I.R. 669 and*R. v. Westminster Council ex parte Ermakov*[1996] 2 All ER 302.

In short, counsel for the applicant strongly objects to the respondent's reliance on Article 5(2) of the Implementing Regulation, on the basis that the respondents are not entitled to raise this as a ground of refusal since it was not invoked by the Tribunal.

36. In any event, counsel submits that the Implementing Regulation has no application to the present case.

37. It is submitted that under the Dublin II Regulation, a requesting Member State was not under any time constraints with respect to when they should make a "take back request". However, under the current Dublin III Regulation, the Member State making a take back request must act within two months from the date of the Eurodac hit. It is submitted that in circumstances where the former Dublin II Regulation did not impose a time restraint on take back requests, Article 5(2) of the Implementing Regulation cannot be interpreted as conferring on ORAC an extension to the two month time limit in respect of a take back request as is now provided for in Article 23(2 of the Dublin III Regulation . Counsel contends that there is no basis upon which the respondents can invoke Article 5(2) of Implementing Regulation to uphold the Tribunal decision, or otherwise argue the ORAC respected all necessary time limits, since no such time limits in respect of the making of a take back request by a requesting Member State was enacted in the Dublin II Regulation to which Article 23(2) can be said to correlate.

38. Counsel points to Articles 18 and 20 of the Dublin II Regulation, which refer only to the relevant time limits which must be observed by the Member State receiving the

request, and do not address any time limits in respect of a requesting Member State in the matter of a take back request.

39. It is also submitted that in the event that Article 5(2) of Implementing Regulation is considered at all relevant to the present case, one has to have regard to the final sentence of Article 5(2) which strictly outlines the parameters of any request for a re-examination of a take charge or a take back request.

The respondents'submissions

40. It is submitted on the respondents' behalf that a take-back request was made of the UK within the relevant time periods under Article 23(1) of the Dublin III Regulation. Pursuant to Article 25(1), the UK was obliged to act within two weeks, and did so by way of letter dated 29th July, 2015. It is submitted that, subsequently, the Commissioner requested the UK to reconsider its decision, in accordance with Article 5(2) of the Implementing Regulation, which the UK then did, ultimately acceding to the take-back request.

41. The respondents' contention is that the provisions of the Dublin III Regulation must be read in accordance with Article 5(2) of Implementing Regulation. It is submitted that the operation of Article 5(2) is entirely in accordance with the purpose and intent of the Dublin III Regulation. It ensures that in the event that a decision is made by a requested Member State that is erroneous, the request is not spent and the error may be corrected. Hence, Article 5(2) serves to ensure the orderly running of a cohesive common European asylum system, whereby the requesting Member State may, where necessary, put forward further information and/or request that the take back application is reconsidered by the requested Member State, since some aspect of the request may have been overlooked, some error made or some information omitted from the take-back request. Thus, Article 5(2) of Implementing Regulation provides for Member States to take steps that will ensure the criteria laid down in Ch. III of the Dublin III Regulation are properly applied.

42. The respondents submit that if the Tribunal is correct in finding that the UK response was in fact a request for further information, there can be no breach of any time limits and thus the applicant's case falls away.

43. In summary, it is the respondents' contentions are:

> (i) The take-back request of 15th July 2015 was not spent by reason of the initial refusal of the UK of 29th July 2015.
>
> (ii) The time limit for seeking a re-examination of the decision of the requested Member State was within three weeks of receipt of the negative reply (as provided for by Article 5(2) of the Implementing Regulation), which time period was met by the request of 18th August, 2015 in response to the initial refusal of 29th July, 2015.
>
> (iii) Article 5(2) does not stipulate that any particular form must be used where a re-examination is requested and accordingly this ground is also misconceived.

44. It is also submitted that it was entirely reasonable and correct for the Tribunal to describe ORAC's letter of 18th August, 2015 as a reiteration of information provided as part of the request of 15th July, 2015. Accordingly there was no mischaracterisation as alleged in Ground 5(iv) of the Statement of Grounds.

The applicant's response to the respondents'submissions
45. Counsel submits that the trigger for the procedure under Article 5(2) of Implementing Regulation is a "negative reply" from a requested Member State and requires an opinion to be formed by the requesting Member State that there has been a "misappraisal" by the requested Member State, or that the requesting Member State has "additional evidence to put forward". It is submitted that, the Tribunal, by contrast, found as a matter of fact that there was no "negative reply". Rather, it found that there was a request by the UK authorities for further information. For the Implementing Regulation (if it were applicable in the first instance) to be relevant to the applicant's case, the letter sent by ORAC on 18th August, 2015 should have contained new information, which it did not. It is submitted, therefore, that based on the Tribunal's own reasoning, Article 5(2) of the Implementing Regulation cannot apply. Counsel also asserts that for Article 5(2) to apply, the Tribunal should have firstly made a finding that the UK authorities gave a negative reply to the take back request. The Tribunal then should have gone on to ascertain whether ORAC had put to the UK the case that there had been a misappraisal on the part of the UK authorities or that it had additional information to offer. It is submitted that the Tribunal did none of the foregoing and rather confined itself to making the erroneous finding that the original "take-back" request was in time, a finding which could not rationally have been made since the original take back request had been disposed of by virtue of the negative reply of 29th July, 2015.

Considerations
46. The first issue to be decided is whether, as contended by the applicant, the respondents' now reliance on Article 5(2) of the Implementing Regulation in opposing the within application for judicial review is tantamount to a reason for refusing the applicant's appeal which was not relied on by the Tribunal itself in the refusal decision. I accept this to be the case. The Tribunal did not invoke Article 5(2) as a basis for its refusal of the applicant's appeal. The Tribunal adjudicated on the matter solely by reference to the take back request of 15th July, 2015, and not by reference to any post-denial request by ORAC pursuant to the provisions of Article 5(2) that the UK authorities reappraise or re-examine the take back request. The salient finding of the Tribunal was that the UK authorities' response of 29th July, 2015 was not a denial but rather a request for further information before a final decision would be made on the take back request of 15th July, 2016.

47. Counsel for the respondents accepts that the respondents are bound by the findings of fact made by the Tribunal. Counsel contends, however, that, contrary to the applicant's argument, the Court is not being requested to depart from the factual findings of the Tribunal. I will return to this submission.

48. The essence of the applicant's case is that the Tribunal was wrong in fact when it found that ORAC's take-back request had not been refused by the UK authorities on 29th July, 2016. The applicant contends that the letter of 18th August, 2015 from ORAC to the UK was a fresh take-back request, which was out of time, having regard to the date of the Eurodac hit.

49. To my mind, a clear reading of the letter of 29th June, 2015 shows that the take back request stood refused by the UK authorities as of that date.

50. I find that the UK authorities complied with their obligations in the following way: they replied to the standard form request of 15th July, 2015 within two weeks, on 29th July, 2015, refusing the take back request. Albeit there was an invitation to ORAC to provide further information, the clear import of the letter as of 29th July, 2015 is that the take back request was denied. Obviously, had ORAC sent the information which it ultimately furnished to the UK authorities on 18th August, 2015 on any date between 29th July and 16th August, 2015, the applicant would have no cause for complaint as the

take back request would still have been within two months of the Eurodac hit. That was not the case however.

51. I find that the Tribunal's description of the Irish authorities' letter of 18th August, 2015 as comprising, effectively, part of the take back request of 15th July, 2015 had the effect of extending the strict two month time limit provided for in Article 23(2) of the Dublin III Regulations, which, to my mind, is clearly not permitted by the Dublin III Regulations.

52. I accept the applicant's submission that the essential difference between the Tribunal's position and what is now being advocated by the respondents is that the Tribunal found as a matter of fact that a single procedure, namely the take back request, remained open and ongoing until the eventual acceptance by the UK authorities, whereas the respondents' now argument, pursuant to Article 5(2) of the Implementing Regulation, presupposes a two-pronged procedure, namely a refusal of the take back request by the UK authorities and a subsequent application by ORAC that the matter be re-examined by the UK authorities.

53. It is now being said by the respondents, effectively, that the Court can approach the issue from the perspective that the take back procedure initiated on 15th July, 2015 in fact concluded with a negative reply from the UK authorities, with a second procedure (a request for a reconsideration or a re-appraisal pursuant to Article 5(2) of the Implementing Regulation) then having been commenced in light of that initial closure of the procedure.

54. I agree with the applicant's submission that if the Court were to adopt this approach, the Court would have to ignore the finding of fact of the Tribunal and itself take on the role of the Tribunal and deal with the applicant's appeal. Such a course is not permitted in judicial review. Any consideration of the particular factual circumstances of the take back request is a matter for the relevant decision-maker and not for the Court. The role of the Court on judicial review in relation to factual matters is to ascertain whether factual findings made by the decision-maker were arrived at reasonably or rationally and/or in accordance with fair procedures. In the instant case, given the clear import of UK authorities' letter of 29th July, 2015 I find that it was not rational for the Tribunal to make a finding that the take back request had not been refused when the letter from the UK authorities clearly stated as much.

55. Albeit that the Tribunal did not invoke Article (5) of the Implementing Regulation, and notwithstanding the applicant's preliminary objection to the respondents' reliance on Article 5(2), the Court proposes to consider the import of this Regulation. I do not consider that the applicant is in any way prejudiced by this since lengthy submissions have been made on his behalf on the issue of the applicability or otherwise of Article 5(2) of the Implementing Regulation.

56. It is the case that Article 5(2) provides for a mechanism whereby in the case of a negative reply from a requested Member State in respect of a take charge or a take back request, the requesting Member State may ask for its request to be re-examined where it feels that the refusal is based on a misappraisal, or where it has additional information to put forward.

57. The full text Article 5 of the Implementing Regulation is as follows:

> "1. Where, after checks are carried out, the requested Member State considers that the evidence submitted does not establish its responsibility, the negative reply it sends to the requesting Member State shall state full and detailed reasons for its refusal.

> 2. Where the requesting Member State feels that such a refusal is based on a misappraisal, or where it has additional evidence to put forward, it may ask for its request to be re-examined. This option must be exercised within three weeks following receipt of the negative reply. The requested Member State shall endeavour to reply within two weeks. In any event, this additional procedure shall not extend the time limits laid down in Article 18(1) and (6) and Article 20(1)(b) of Regulation (EC) No 343/2003."

58. The respondents submit that even if the Tribunal did not approach the matter as it ought to have, the procedures followed by ORAC were nevertheless correct in law, having regard to the provisions of Article 5(2) of the Implementing Regulation. In those circumstances, it is submitted that there is no reason for the Court to remit the matter back to the Tribunal, if the Court were to find that the Tribunal erred.

59. Article 5(2) of the Implementing Regulation expressly allows the requesting Member State three weeks within which to seek a reconsideration of a refusal; it does not impose a strict time limit on the requested Member State, save only it directs that the requested Member State shall endeavour to reply within two weeks, rather than being required absolutely so to do. Proceeding, for the moment, on the assumption that ORAC's correspondence of 18th August, 2015 was a request for a re-examination of the refusal, it is the case that ORAC's request was (pursuant to Article 5(2) of the Implementing Regulation) within the allowable three weeks period for a response to the UK authorities' letter of 29th July, 2015. The respondents also point to the UK's (the requested Member State) response to ORAC on 18th August, 2015, such response period being again in accordance with that envisaged by Article 5(2) of the Implementing Regulation.

60. To assess whether the respondents can invoke Article 5(2) in aid of their submissions, one must firstly look to the provisions of the Implementing Regulation itself. The detailed arrangements between Member States which govern the operation of the former Dublin II Regulations, and now the Dublin III Regulations, are set out in the Implementing Regulation. Article 5(2) of the Implementing Regulation has not been repealed or amended by the Dublin III Regulations, albeit that pursuant to Article 48 of the Dublin III Regulations some provisions of the Implementing Regulation have been repealed.

61. It is not disputed by the applicant that the EU Legislators clearly intended that the Implementing Regulation should continue to apply to the Dublin III Regulation subject to the repeal by Article 48 of the Dublin III Regulation of particular Articles of the Implementing Regulation.

62. Article 48 states as follows:

> "Repeal: Regulation (EC) No 343/2003 is repealed.
>
> Articles 11(1), 13, 14 and 17 of Regulation (EC) No 1560/2003 are repealed.
>
> References to the repealed Regulation or Articles shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II."

63. However, the argument advanced by the applicant in this case is that Article 5(2) has no applicability at all to the applicant's circumstances and that if it is applicable, ORAC did not abide by its provisions. The case made by the applicant can be summarised as follows: The clear meaning of Article 48 of the Dublin III Regulation is that when Article 5

of the Implementing Regulation is considered, the references to Dublin II are to be "filtered" through Annex II in the Dublin III Regulation so that it can therefore be seen to which Articles of the Dublin III Regulation the Implementing Regulation applies. It is the applicant's contention that the respondents, in their submissions to the Court, invoke and rely on Article 5(2) of the Implementing Regulation by reference only to Article 25(1) of the Dublin III Regulation (which provides for the time limits for reply by a*requested*Member State to a take back request).

64. As is clear from Annex II to the Dublin Regulations, Article 25(1) of the Dublin III Regulation correlates to Article 20(1)(b) of the Dublin II Regulation. However, the case the applicant makes is that there is no provision in the Dublin II Regulation to which Article 23(2) or (3) of the Dublin III Regulation (which concerns the time limits for the making of a take back request) co-relates. Accordingly, the applicant contends that Article 5(2) of the Implementing Regulation cannot be applied to Article 23(2) or (3) of the Dublin III Regulation because Article 23(2) or (3) has no corresponding provisions in the Dublin II Regulation as regards time limits for a Member State requesting another Member State to take back an asylum applicant. In the present case, it is the time limit provided for in Article 23(2) that is in issue. It is thus argued by the applicant that the Implementing Regulation has nothing to implement with respect to Article 23(2) and (3) of the Dublin III Regulation.

65. In essence, under the former Dublin II regime, a requesting Member State was not under any time constraint with respect to when it should make a take back request. However, under the Dublin III regime, a take back request must be made within two months of a Eurodac "hit". It is thus submitted on behalf of the applicant that in circumstances in which the former Dublin II Regulation did not impose time restraints on take back requests, and only imposed time restraints on the replies to such requests, Article 5(2) of the Implementing Regulation cannot be interpreted as conferring on ORAC an extension to the two month time limit in which it must act pursuant to the Dublin III Regulation.

66. It is further submitted that as under the Dublin II Regulation the requested Member State's time limit for reply to a take back request was two weeks, the opportunity to seek an appraisal would not be applicable if this two week time limit had already run its course. This is so, it is submitted, given that Article 5(2) explicitly states that "this additional procedure shall not extend the time limits laid down in…Article 20(1)(b) [of the former Dublin II Regulation]". Counsel for the applicant points to the provisions of Article 20(1)(b) of the Dublin II Regulation which provided:

> " the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks;"

67. Counsel also submits that insofar as Article 5(2) may appear at first blush to give a requesting Member State extra time in respect of a take back request, such request for a reappraisal cannot be made beyond three weeks of the take back refusal, and, more importantly, beyond the outer time limit provided in the Dublin III Regulation for a take back request to be made.

68. The applicant asserts that the provisions of Article 5(2) of the Implementing Regulation specifically states that the time limit in Article 20(1)(b) of the Dublin II Regulation (which refer to the time which a requested Member State has to reply to a take back request) cannot be extended by the Implementing Regulation. It is contended that insofar as Article 5(2) allows for the possibility of the re-examination of a take back request, such re-examination must be done within the timeframes permitted by the substantive Regulation, be it Dublin II or Dublin III. Thus, it is the applicant's contention

that if in principle Article 5(2) is deemed applicable to the present application, the principle would not permit any extension of time for a take back request to be re-animated beyond 16th August 2015.

69. Counsel for the applicant further submits that the Implementing Regulation, as the instrument "laying down detailed rules for the application of Council Regulation EC No 343/2003", is only permitted to implement the provisions of the substantive Regulation and cannot alter them to provide new time limits. Counsel asserts that this is re-iterated in the wording of Article 5(2) itself which explicitly states that the procedure ordained by the provision does not extend the time limits set out in the former Dublin II Regulation.

70. Additionally, counsel argues that even if the respondents are entitled to invoke Article 5(2), as a purely administrative arrangement as between Member States Article 5(2) cannot be held to trump the individual right of complaint for which the Dublin III Regulations make provision.

71. The Court is not persuaded by the applicant's latter argument. Clearly, the EU legislators have made provision in the Implementing Regulation for rules which are to govern the criteria and mechanisms set out in the substantive Regulation for determining the Member State responsible for an asylum claim lodged in one of the Member States by a third country national. In my view, once the criteria and mechanisms are complied with in accordance with the requisite rules, there can then be no question of the trumping of such individual rights as the Dublin III Regulation affords an asylum applicant.

72. To return however to the applicant's principal argument, namely that the respondents' reliance on Article 5(2) of the Implementing Regulation is misplaced.

In the first instance, I accept the applicant's submission that as far as the time limit provided for in Article 23(2) of the Dublin III Regulation is concerned there is no corresponding provision in the Dublin II Regulation to Article 23(2) of the Dublin III Regulation. Indeed, Article 20(1)(a) did not impose a time limit within which a requesting Member State had to make a take back request. It did however impose a time limit on the requested Member State, as set out in Article 20)(1)(b) of the Dublin II Regulation. Overall, I am minded to accept the applicant's submission that the Implementing Regulation has nothing to implement with regard to Article 23(2) of the Dublin III Regulation since the time limits in that Article had no equivalent in the former Dublin II Regulation.

73. That being said, it is the case that Article 5(2) (which covers both take charge and take back procedures) clearly provides for the authorities in a requesting Member State (such as ORAC in the present case) to request a re-examination or reappraisal of a refusal by the requested Member State.

74. The Irish authorities' letter of 18th August, 2015 could potentially reasonably be construed as a request for a reappraisal on foot of a refusal. As I said, however, that is a factual matter for the decision-maker to assess.

75. Even if the Implementing Regulation could be said to be applicable, to my mind, the salient feature of Article 5(2) is that, insofar as it provides for time limits for a requesting Member State to seek re-examination or reappraisal of a refusal to take charge or take back, and for the requested Member State to respond to such requests, it remains the overarching premise that the Article 5(2) procedure shall not extend the time limits for the take charge or take back requests as set out in the prior Dublin II Regulation (and in the now Dublin III Regulation).

76. Accordingly, I cannot conceive that there is any scope for the respondents' argument

that simply because ORAC complied with the terms of Article 5(2) in seeking an examination or appraisal of the refusal decision within three weeks of the UK authorities' refusal, and where also the UK authorities responded within the timeframe envisaged by Article 5(2), those interactions were therefore in accordance with Article 5(2). That could only hold true, in my view, if the Article 5(2) procedure was conducted within the timeframe provided for in Article 23(2) of the Dublin III Regulation.

77. To my mind, in circumstances where Article 5(2) of the Implementing Regulation was at pains to ensure that the re-examination procedure provided for therein would not extend the time periods in Article 20(1)(b) of the former Dublin II Regulation (now Article 25(1) of the Dublin III Regulation) in which a requested Member State must address a take back request, there is no scope for any argument that the same restriction should not apply to a*requesting*Member State, particularly given the strict time limits laid down in Article 23(2) of the substantive Dublin III Regulation.

78. The overarching timeframe which governs the applicant's circumstances is that set out in Article 23(2) of the Dublin III Regulation.

Summary

79. I find that the Tribunal's erroneous conclusion that the response of the UK authorities of 29th July, 2015 did not amount to a denial of the take back request to be tantamount to a failure by the Tribunal to have regard to the relevant time limits as provided for in Article 23(2) of the Dublin III Regulation.

80. Accordingly, I find the challenge to the decision of 8th April, 2016 made out. I propose therefore to grant an order of*certiorari*quashing the decision.