OUTER HOUSE, COURT OF SESSION

[2017] CSOH 17

P675/15

OPINION OF LORD ERICHT

In the cause

BAHRI MUCAJ

Petitioner

against

ADVOCATE GENERAL FOR SCOTLAND

Respondent

Pursuer: Caskie; Drummond Miller LLP
Defender: Pirie; Office of the Advocate General

3 February 2017

[1] The petitioner seeks reduction of the respondent's decision to remove him to Belgium on the basis that the United Kingdom is in breach of certain time limits under the Dublin III Convention.

Immigration History
[2] The petitioner is Albanian. With his family, he arrived in Belgium on 15 November 2011. His asylum claim was refused by the Belgian authorities on 15 September 2012.
[3] On 29 December 2014, the petitioner and his family sought entry to the United Kingdom and claimed asylum. The respondent established that he had been in Belgium. The respondent made a "take back" request to the Belgian authorities in terms of the Dublin III Regulations. By letter dated 7 January 2015, the Belgian authorities accepted the transfer of the petitioner according Article 18.1(d) of the Dublin III Regulations. By letter dated 9 January 2015, the respondent declined to examine the asylum application substantively on the basis that there was a safer country to which the applicant could be sent, and certified that the conditions mentioned in paragraphs 4 and 5 of part 2 of schedule 3 to the Asylum & Immigration (Treatment of Claimants, etc) Act 2004 were satisfied. On 1 April 2015, the petitioner's solicitor wrote to the Secretary of State submitting that to remove the petitioner and his family to Belgium would breach Articles 3 and 8 of the European Convention of Human Rights and Fundamental Freedom. The claim was based on the living conditions which the family had endured while in Belgium, and the risk that they might be subject to similar living conditions on return. That claim was refused by the respondent on 29 April 2015. On 9 June 2015 the respondent issued removal directions.

History of the Case
[4] The petitioner petitioned for Judicial Review seeking reduction of the removal decision, the third party certification, the decision of 29 April 2015 on Article 3 and the certification decision of 29 April 2015. First orders were granted on 30 June 2015. In accordance with her policy, the Secretary of State cancelled the removal directions upon the granting of first orders. At that time a number of Judicial Review petitions had been presented to the court raising issues similar to that of the current petition in relation to Article 3 of the ECHR in the context of returning asylum seekers to European countries under Dublin III. On 17 July 2015, the current petition was sisted until 27 November 2015 pending the decision in the lead cases. That decision was issued on 16 July 2015 (*AL* v *Advocate General for Scotland* [2015] CSOH 95; 2015 SLT 507). The Lord

Ordinary found in favour of the respondent. The petitioners in the lead cases reclaimed but subsequently abandoned the reclaiming motion.

[5] Thereafter there were amendments and sundry procedure in the present case, in order to take account of the decision of the Lord Ordinary in the lead cases. The petitioner further amended the petition at the bar at the outset of the hearing before me on 3 November 2016.

[6] The result of these amendments was that the petitioner no longer sought reduction on the grounds of Article 3 or Article 8. The sole ground for reduction was breach of time limits under Dublin III.

[7] Accordingly, further to those amendments, the orders sought by the petitioner at the hearing before me in terms of paragraph 3 of the petition were:

> "(i) reduction of the decision to remove the Petitioner to Belgium as that decision in unlawful *et separatim* unreasonable, whilst it is accepted that the removal date has passed the Secretary of State still intends to remove to Belgium and it is that decision and not removal on a specified date the Petitioner seeks reduction of;
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> (ii) reduction of a decision to certify the decision to remove to Belgium on third country grounds taken on or about 29th January 2015, certification is part of the process of removal and if removal is unlawful so too is taking steps in the process of affecting that (where the certification has no other effect); …
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> (v) the expenses of the petition;
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> (vi) such other orders as may seem to the Court to be just and reasonable in all the circumstances of the case."

[8] At the outset of the hearing, counsel for the petitioner indicated that the following paragraphs of the petition related primarily to orders which were now no longer being sought: 8-14, 16-30, 32, and 36.

The Dublin III Regulations (*Regulation (EU) No 604/2013 of 26 June 2013)*

[9] The relevant parts of the Dublin III Regulations are as follows.

[10] The recitals to the Regulation include the following:

> "(1) A number of substantive changes are to be made to Council Regulation (EC) No 343/2003 of 18 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. In the interests of clarity, that Regulation should be recast.
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> (2) A common policy on asylum, including a Common European Asylum System, (CEAS), is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union.
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> (3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing the CEAS, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. In this respect, and without the responsibility criteria laid down in this Regulation being affected. Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals.

(4) The Tampere conclusions also stated 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.

(5) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection. …

(9) In the light of the results of the evaluations undertaken in the implementation of the first-phase instruments, it is appropriate, at this stage, to confirm the principles underlying Regulation (EC) No 343/2003, while making the necessary improvements, in the light of experience to the effectiveness of the Dublin system and the protection granted to applicants under that system. Given that a well-functioning Dublin system is essential for the CEAS, its principles and functioning should be reviewed as other components of the CEAS and Union solidarity tools are built up. A comprehensive 'fitness check' should be foreseen by conducting an evidence-based review covering the legal, economic and social effects of the Dublin system, including its effects on fundamental rights.

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

[11] The request for transfer of the petitioner which was accepted by the Belgian authorities on 7 January 2015 was under Article 18.1(d) which is as follows:

"18. The Member State responsible under this Regulation shall be obliged to:

…

(d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document."

[12] Article 23 sets out procedures for submitting a take back request when a new application has been lodged in the requesting Member State. It provides that "a take back request shall be made as quickly as possible and in any event within two months of receiving the Eurodac hit …" (Article 23.2). A Eurodac hit is a hit on central database of asylum seekers.

[13] Article 23.3 provides:

"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."

[14] Article 25.1 provides that the requested Member State shall give a decision as quickly as possible and in any event no later than one month from the date the request was received.

[15] Article 26 provides for the transfer decision to be notified to the applicant or other relevant persons.

[16] Article 27 provides:

"Remedies

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

2. Member States shall provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.

3. For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:

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

(b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or

(c) the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based.

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

[17] Article 29 provides:

"**Transfers**

Article 29

Modalities and time limits

1. The transfer of the applicant or of another person as referred to in Article 18(1).. (d) from the requesting Member State to the Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3). …

2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds."

Dublin II Council (Regulation (EC) 343/2005)

[18] It can be seen from the above that Dublin III separated suspension into two separate provisions, with suspension by competent authorities such as the respondent being referred to in Article 27(4) and not Article 27(3)(c). Dublin II had dealt with suspension by the court and suspension by competent authorities together in Article 20 as follows:

> "1(e) the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. … This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer **except when the courts or competent bodies so decide** in a case-by-case basis if the national legislation allows for this." (emphasis added)

The Petitioner's Submissions

[19] The petitioner submitted that in the current case the 6 month time limit in Article 29(1) had been breached. Article 29(1) required the respondent to return the petitioner to Belgium within 6 months of 7 January 2015. That 6 month deadline had not been suspended. Article 29(1) provided for suspension "in accordance with article 27(3)". Article 27(3) would have applied had the court suspended the transfer on the lodging of the petitions. However, that had not happened in this case. Instead, in accordance with the Secretary of State's policy the removal directions were cancelled. That was a suspension under Article 27(4). Article 29(1) referred only to Article 27(3) and therefore a suspension under Article 27(4) did not suspend the 6 month deadline. As the transfer had not taken place within the 6 month time limit, Belgium had been relieved of its obligations to take back the petitioner and responsibility had been transferred to the United Kingdom, all in terms of Article 29(2). The consequence of this was that the United Kingdom could not transfer the petitioner back to Belgium and instead the United Kingdom required to make its own substantive decision on the petitioner's claim for asylum. Counsel for the petitioner submitted under reference to *Abdullahi v Bundesasylamt* [2014] 1 WLR 1895 (CJEU,) *Ghezelbash v Staatssecretaris van Veiligheid en Justitie,* CJEU, 7 June 2016, (Case C-63/15) and *Karim v Migrationsverket* CJEU, 7 June 2016 (Case c-155/15) that an asylum seeker is entitled to plead the failure the transferring Member State to effect the transfer within the 6 month time period. He further submitted that the respondent's position in the current case was different from what it had been in *AL* v *Advocate General for Scotland.* He further submitted that the *dicta* of the Lord President in *Miab* v *The Secretary of State for the Home Department* [2016] CSIH 64 at paragraphs [68]-[69] were *obiter* and should not be followed. The separation of suspension by a competent authority to a separate provision in 27(4) was a deliberate and conscious act by the drafters of Dublin III to remove the suspensive effect from decisions of competent authorities such as the Secretary of State and only allow suspensive effect where there was a decision by a court. A purposive interpretation should be used to give effect to that policy. In the event that I was not with him, counsel for the petitioner invited me to make a reference to the Court of Justice of the European Union under Article 267 of the Consolidated version of the Treaty on the Functioning of the European Union. He did not at this stage have any proposed draft wording for a reference, but this could be provided in due course.

[20] Counsel for the respondent submitted:

> (1) on the correct interpretation of Dublin III, the time limit in Article 29(1) had not passed. Applying the principles that preference must be given to the interpretation which ensures that the provision retains its effectiveness and the provision must be interpreted in a way that avoids absurdity, the time limit in Article 29 would not be reached until 6 months after the court had determined the current petition because:
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> > (a) that was the literal reading of the article: the petitioner has had "the opportunity" to request a court or tribunal to suspend the transfer decision;
> >
> > (b) The alternative reading of the article would have the absurd results (i) that an asylum seeker could rely on a decision that he had asked the respondent to make to resist the respondent's later attempts to remove him and (ii) of potentially requiring the respondent to seek an order from the court suspending the implementation of her own decision.
> >
> > (c) The alternative reading would defeat the purpose of Article 27(4).

(d) The alternative reading would not achieve the objectives of Dublin III of increasing the effectiveness of the Dublin system and enhancing protection for asylum-seekers.

(2) *Esto*, a person could not challenge a decision by the respondent on the ground that the time limit in Article 29 had passed: a challenge was only available to him if it fell within the scope of his right of appeal or review under Article 27(1) of Dublin III.

(3) *Esto*, the court's discretion not to reduce an unlawful decision applied even where the error of law is a breach of a procedural obligation imposed by EU law, and the petitioner had suffered no prejudice. (*AL v Advocate General for Scotland* at paras [71]-[73]).

[21] Counsel for the respondent opposed the motion for a reference on the ground that it was not necessary for the decision.

Discussion and Decision

Interpretation of Article 29(1)

[22] In *Miab* v *The Secretary of State for the Home Department* [2016] CSIH 64 the Lord President stated at paragraph [69]:

> "Article 29 of Dublin III provides that time will not start to run until there has been a final decision on a review where "there is a suspensive effect in accordance with Article 27(3)". Article 27(3)(c) refers to the situation where the applicant has had "the opportunity to request … a court… to suspend the implementation of the transfer decision pending the outcome of his or her… review". That opportunity was afforded to the petitioners. The result of the court granting first orders was that the respondent cancelled the removal directions. That did not alter the fact that an opportunity had been afforded to the petitioners in terms of Article 27(3)(c) and a "suspensive effect" followed therefrom because the state in effect suspended the transfer decision. In addition, the respondent's argument that a contrary interpretation would achieve an absurd result has merit. After all, the respondent can hardly ask the court to suspend her own decisions. **The purpose of Article 29 is to place a limit on the time it takes for the transferring state to act after acceptance of the transfer, subject to the existence of an ongoing review process at the instance of the applicant.** A question about whether the time limit has been exceeded should be answered at the point when, but for the judicial process, the original removal direction would have had effect. This view accords with such a purposive interpretation.." (emphasis added)

[23] In my opinion the above passage sets out the proper approach to the interpretation of Article 29(1). I agree that the purpose of Article 29 is to place a limit on the time it takes for the transferring state to act after acceptance of the transfer, subject to the existence of an ongoing review process at the instance of the applicant. The Article must be construed with that purpose in mind. The appellant advanced an alternative construction based not on that purpose but on the separation into separate paragraphs of suspension by the court and suspension by a competent authority. In my opinion that mere separation is not enough to demonstrate a purpose which is different from that set out by the Lord President. The petitioner's argument was that the separation into two paragraphs was to give effect to a deliberate change in policy from Dublin II to the effect that suspension of the six month time limit would cease to apply to suspensions by competent authorities and apply only to suspensions by courts. No such change of policy was articulated in the recitals to Dublin III. I was referred to no potential aids to construction such as travaux préparatoires or EU policy statements or academic commentaries which might have supported that argument. In these circumstances the separation in the drafting falls to be construed within the purpose set out by the Lord President above. That purpose would not be well served if the time limit and suspension provisions had different effects depending on the arbitrary question of whether suspension happened to be by a court or competent authority.

[24] Applying that purposive construction to the current case, the 6 month time limit has been suspended by the Secretary of State's cancellation of removal directions.

[25] That in itself is sufficient to dispose of this case. However, for the sake of completeness, I shall go on to consider the other issues which were argued before me.

Whether the Article 29.1 Enshrines a Right to which is Vested in the Applicant

[26] In *Miab* the Lord President stated at paragraphs [67]-[68] as follows:

> "[67] Dublin III gives an applicant the right to challenge a transfer decision "in fact and law". It altered the approach to Dublin II set out in *Abdullahi* v *Bundesasylamt* [2014] 1 WLR 1895 (CJEU,) which had held that the only ground of challenge was a systematic flaw in the receiving country, such that the applicant would be at real risk of suffering inhumane or degrading treatment. Henceforth, in terms of the effective remedy provision in Article 27(1), which was foreshadowed by Recital 19, an applicant would have a wider right to challenge errors in carrying out the Dublin III procedures or in the application of its criteria (*Ghezelbash* v *Staatssecretaris van Veiligheid en Justitie*, CJEU, 7 June 2016, (Case C-63/15) at paras 36 and 39).
>
> [68] It does not follow, however, that each Article of Dublin III enshrines a right which is vested in the applicant. In particular, as with Dublin II, many of the time limits are solely intended to regulate the position as between different Member States. They permit, for example, a Member State, into which an applicant has first entered, to refuse to receive back that applicant from another Member State if certain time limits have expired or other circumstances exist. However, if the receiving Member State does found upon a particular matter, and is content to receive back the applicant, that will remain the default position in the application of Dublin III as it was with Dublin II; *viz* that the first Member State into which an applicant has entered has the primary responsibility to determine the application. That, of course, presupposes that the correct procedures have been followed and the correct criteria applied."

In my opinion, on a proper construction of the Regulations, the time limits in Regulation 29 are solely intended to regulate the matter between member states. That construction is in accordance with the purpose referred to in para 23 above. There is no suggestion in this case that the correct procedures have not been followed nor the correct criteria applied. Accordingly, the petitioner's case would fail on this ground also.

Prejudice

[27] Had I been required to do so, I would have exercised my discretion in favour of the respondent and refused to grant the orders sought on the grounds that no prejudice had been suffered by the petitioner. The petitioner's asylum claim had already been dealt with by the Belgian authorities. The merits of that decision were not criticised in any way in the current proceedings. There was no suggestion that the UK authorities would make any different decision from that which had been made by the Belgian authorities. The effect of the respondent's decision to suspend was that the petitioner was able to remain in the UK while this petition was being determined. There has been no prejudice to the petitioner in being able to stay in the UK, and not be returned to Albania, in the period since the suspension of the removal directions in July 2015.

Reference

[28] In the light of the above, in my opinion, a decision of the Court of Justice of the European Union is not necessary to enable me to give judgment in this case and accordingly it is not appropriate to make a reference to that court.

[29] I uphold the respondent's first, third and fourth pleas-in-law, repel the petitioner's pleas-in-law numbers 1, 2 and 5 and refuse the petition. I reserve all questions of expenses in the meantime.