

**THE HIGH COURT  
JUDICIAL REVIEW**

**Record No. 2020/503JR**

**BETWEEN:**

**LK**

**APPLICANT**

**-V-**

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR  
JUSTICE AND EQUALITY**

**RESPONDENTS**

**Judgment of Ms Justice Tara Burns delivered on the 4th day of December, 2020**

**Background**

1. The Applicant is a national of Lesotho. He entered the State on 31 August 2018 and applied for international protection on 3 September 2018.
2. The Applicant had been studying in the Netherlands from August 2016. He had travelled to the United Kingdom in June 2017 and August 2018 with the benefit of short stay visit visas. Arising from the issuance by the United Kingdom of these two visas, a request to take charge of this international protection application was made to that State pursuant to EU Regulation 604/2013 (hereinafter referred to as "the Dublin III Regulation"). The United Kingdom agreed to this request on 19 December 2018.
3. On 11 January 2019, the Applicant was advised that the United Kingdom accepted responsibility for his international protection application. He was afforded the opportunity to make submissions, which he availed of.
4. On 30 January 2019, a case processing panel member within the International Protection Office, having considered the representations made by the Applicant and the fact that the United Kingdom had accepted responsibility for the international protection claim, recommended that a Notice of Decision to Transfer to the United Kingdom should issue to the Applicant. An International Protection Officer (hereinafter referred to as "the IPO"), having considered the file, approved the panel member's recommendation.
5. The Applicant appealed this decision to the First Respondent. A preliminary point was raised that the case processing panel member did not have jurisdiction to make such a recommendation pursuant to the European Union (Dublin System) Regulations 2018 (hereinafter referred to as "the 2018 Regulations"). Substantive appeal submissions were also made to the First Respondent seeking that the First Respondent exercise the Article 17(1) discretion of the Dublin III Regulation in his favour.
6. The First Respondent rejected these arguments and affirmed the Transfer Decision of the IPO on 10 June 2020.
7. On 5 October 2020, the Applicant applied for leave to seek Judicial Review by way of an order of Certiorari quashing the Transfer Decision of the First Respondent. This Court determined to put the State on notice of this leave application. Having done so, the matter was set down for a telescoped hearing on 27 November 2020.

### **Grounds of Challenge to First Respondent's decision**

8. The Applicant submits that the First Respondent's decision is unlawful on two separate grounds. Firstly, it is submitted that the First Respondent was incorrect in determining that the IPO's decision was lawful. It is argued that the decision of the IPO was in effect the decision of the panel member who did not have jurisdiction to make this determination or recommendation pursuant to the 2018 Regulations. Secondly, it is submitted that a portion of the First Respondent's determination, which was outside its jurisdiction, was of such a prejudicial nature to any subsequent Article 17 application to the Second Respondent, that it should be severed from the decision.

### **The Role of the Panel Member**

9. The Applicant submits that the panel member did not have jurisdiction to carry out an examination and make a recommendation in relation to the question of whether the Applicant should be transferred to the United Kingdom pursuant to the Dublin III Regulations. He raised this as an appeal point before the First Respondent. An order of Certiorari is now sought in relation to the decision of the First Respondent which held against him on this submission. The Respondents raise a preliminary issue with respect to this argument to the effect that an appeal of this point of law was not open to the Applicant before the First Respondent; that this issue raised a jurisdictional issue only amenable to Judicial Review which the Applicant did not pursue.
10. The Applicant points to Regulation 6(1) of the 2018 Regulations in support of his argument that the appropriate venue to ventilate this legal issue was by way of appeal before the First Respondent. Regulation 6(1) states:-
- "An applicant may, in accordance with this Regulation, appeal to the Tribunal, in fact and in law, against a Transfer Decision."*
11. He also refers to the intention of the Dublin III Regulation that international protection applications be speedily processed. Recital 5 of the Dublin III Regulation states, with reference to the clear and workable method envisaged by the Dublin III Regulation for determining the Member State responsible for examining an international protection application:-
- "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."*
12. It is submitted by the Applicant that Regulation 6(1) of the 2018 Regulations provides the Applicant with an appeal on any point of law from the IPO to the First Respondent and that the appeal brought by him before the First Respondent was the appropriate avenue for him to adopt with respect to his argument regarding the jurisdiction of the panel member.

13. The Respondent argues that while paragraph 6(1) provides for a wide-ranging appeal from a decision of the IPO, it cannot cover all legal challenges: that challenges which relate to a core jurisdictional issue, can only be challenged by way of Judicial Review. It is submitted that the legal point at issue in the appeal before the First Respondent is such a core jurisdictional issue as the ultimate claim was that the decision of the IPO was vitiated as a result of the alleged unlawful actions of the panel member.
14. While there is much to commend the Applicant's argument that any appeal from the IPO should be to the First Respondent – a specialised body who should be in a position to process appeals quickly, the options available to the First Respondent, having considered an appeal, are very instructive. Regulation 6(9) of the 2018 Regulations provides that the First Respondent "*may decide to a) affirm the Transfer Decision, or b) set aside the Transfer Decision*". The First Respondent has not been given the power to remit the Transfer Decision to the IPO for further consideration. The effect of that is that should the First Respondent determine that there is a legal infirmity with the Transfer Decision, the only option available to it, to give effect to such a finding, is to set aside the Transfer Decision. Accordingly, in that scenario, a transfer will not occur as the decision process regarding a proposed transfer has concluded. This is a major stumbling block for the Applicant's submission. Clearly, in a situation where the point of law is of such a nature that an acceptance of the point requires the matter to be remitted to the IPO so that a lawful decision can be made, the appeal envisaged by the 2018 Regulations is not broad enough in light of the remedies available.
15. Accordingly, I am of the view that the appeal to the First Respondent on this point of law was not appropriate and that therefore it does not fall to this Court to judicially review the First Respondent's conclusions in relation to the point of law as it was not correctly before the First Respondent in the first instance.
16. However, even if I am incorrect about this issue, I am, in any event, of the view that the decision of the IPO was arrived at in a lawful manner.
17. The Applicant submits that the Transfer Decision of the IPO was in effect the decision of the panel member who, it is asserted, did not have jurisdiction to make this decision, or engage in an investigative function.
18. The 2018 Regulations provide for panel members to be engaged under a contract for services, which is defined by Regulation 2(1) as "*a contract for services entered into by the Minister with a person for the provision by the person of assistance to international protection officers in the performance by them of their functions under the Act of 2015, the Regulations of 2014 or any Regulations giving effect to the EU Regulation or to any Regulation amending or replacing the EU Regulation*".

The "EU Regulation" is defined as meaning the Dublin III Regulation.

19. Accordingly, it is perfectly permissible for a panel member to provide assistance to an IPO in the performance by the IPO of his/her functions, specifically in relation to his/her functions under the Dublin III Regulation.
20. It is important to analyse, in the first instance, what the panel member actually did in this case to determine whether he provided assistance to the IPO or whether he carried out a function of the IPO pursuant to the Dublin III Regulations.
21. The panel member prepared a document referred to as a "report" which is entitled:
- "Re: Acceptance by the United Kingdom in accordance with Article 12(2) of Regulation (EU) No. 604/2013 (Dublin III) Regulation) in respect of LK, national of Lesotho, date of birth xx/xx/1985. Known in the United Kingdom under the same identity"*
22. This "report" sets out a narrative of what had occurred in the Applicant's international protection claim which can be summarised as follows:-
- an international protection claim had been made;
  - a s. 13(2) interview had taken place;
  - the Applicant was given information regarding the Dublin III regulation and legal aid information;
  - an interview pursuant to Article 5 of the Dublin III Regulations was conducted. The information given by the Applicant at that interview, which was relevant to a Transfer Decision under the Dublin III Regulations, was summarised;
  - a request to take charge had been made to the United Kingdom;
  - the relevant law with respect to another Member State taking charge of an international protection claim was cited;
  - the United Kingdom agreed to take charge of the Applicant's application;
  - the Applicant and his legal representative were advised of this and were afforded the opportunity to make submissions;
  - submissions had been made and a summary was set out.
23. The "report" then proceeded to address the submissions made by the Applicant. In relation to Brexit, it referred to the "decision maker" only being able to deal with matters as they presently stood. With respect to a request made by the Applicant in his submissions to the IPO that Ireland exercise its Article 17 discretion, the "report" quotes from the CJEU judgment in *MA v. International Protection Appeal Tribunal Case C-661/17*, to the effect that the fact that a Member State has notified its intention to withdraw from the European Union does not oblige a determining Member State to itself

examine an international protection application under the Article 17(1) discretion. On foot of that reference, it is "submitted" in the "report" that Ireland not exercise its discretion under Article 17(1) of the Dublin III Regulations.

24. In its penultimate paragraph, the "report" set out a generalised summary of the aims of the Common European Asylum System. It then concluded as follows:-

*"Having regard to these considerations and the fact that UK authorities have accepted responsibility under [the Dublin III Regulations] for the examination of the application for international protection (which includes refoulement considerations) the transfer cannot be deemed to give rise to refoulement.*

*Accordingly, I recommend that a Notice of Decision to transfer to the United Kingdom issue to the Applicant at his last known address."*

25. I fail to see how that "report" can be classified as a decision. The "report" simply recites a history of relevant events; sets out some relevant law; comments on the submissions made by the Applicant; and, makes submissions in relation to the Applicant's submissions. This document is at most a briefing document, bringing together in a report, the various steps, strands and considerations relevant to the decision which is to be made by the IPO, namely whether a Transfer Decision should be made. In this regard, the panel member's role, can most certainly be described, as providing assistance to the IPO in the examination and decision which the IPO must then make, but it is not a decision.
26. On a specific basis, the Applicant asserts that the panel member recommended to the IPO which EU member state should be responsible for the Applicant's application. This is a complete mischaracterisation of the "report". The United Kingdom had already been identified as the responsible State pursuant to Article 12(2) of the Dublin III Regulations and further had been asked and had accepted taking charge of the Applicant's international protection claim. The panel member's "report" was prepared in the context of this identification and acceptance by the United Kingdom already having taken place. The Applicant further asserts that the panel member recommended whether the Article 17 discretion should be applied. Again, this is a mischaracterisation of the factual position. The panel member referred to relevant case law of the ECJU in relation to the exercise of the Article 17 discretion and made an obvious submission in light of same. With respect to the third specific complaint which the Applicant asserts, namely that the panel member recommended that a Notice of Intention to Transfer the Applicant should issue, the report does not reflect a decision that a notice of intention to transfer should issue or indeed a decision to transfer. Such a decision was subsequently taken by the IPO having considered the file, the documents and the considerations of the panel member. No delegation of the IPO's function to the panel member took place.
27. The question of who actually made the Transfer Decision in this matter is clear from the decision of the IPO which reads as follows:-

“TRANSFER DECISION

*I have considered the file and all the documentation contained within. I hereby approve the above consideration and find that a Notice of Decision to Transfer should issue to the Applicant.*

*Accordingly, a Notice of Decision to Transfer the Applicant to the United Kingdom will issue to the Applicant at his last known address.”*

28. Accordingly, the IPO, having considered the file and all the documentation contained therein and having considered the “*report*” of the panel member, approved the submission made by the panel member that the Applicant be transferred to the United Kingdom on foot of the United Kingdom agreeing to take charge of the Applicant’s international protection application and thereupon made a decision to transfer him.
29. On foot of that analysis, there is no question of the Panel member exercising the “*functions of a determining Member State*” pursuant to Regulation 3(1)(a) of the 2018 Regulations and the issue of the lawful delegation of power to a panel member pursuant to Regulation 4(3) of the 2018 Regulations does not arise for consideration.
30. If I am incorrect in that analysis however, a literal interpretation of the 2018 Regulations clearly provides, although in a cumbersome manner, for the delegation of the IPO’s functions, as a determining member state, to a panel member.
31. Regulation 4(3) of the 2018 Regulations provides that *[t]he chief international protection officer may delegate to a person who has entered into a contract for services the functions of an international protection officer under paragraph (1)*. The question arises what functions are being referred to.

Paragraph (1) of Regulation 4 provides:-

*“An international protection officer shall, where necessary for the purpose of performing his or her functions referred to in Regulation 3(1)(a)...conduct a personal interview with the applicant concerned...”*

Regulation 3(1) provides:-

*“The following functions under the EU Regulation shall be performed by an international protection officer save as otherwise provided in these Regulations:*

*(a) The functions of a determining Member State”*

32. The Applicant submits that the “*functions*” being referred to in Regulation 4(3) is the “*function*” of conducting a person interview with an applicant. However, that cannot be correct. The use of the plural in “*functions*” must mean something other than a single “*function*” of conducting a personal interview. Regulation 4(3) provides the answer as the “*functions*” are stated to be those referred to in paragraph (1). Paragraph (1) of Regulation 4 refers to the “*functions*” of an IPO referred to in Regulation 3(1)(a). These

"functions" are clearly the "functions" which are being referred to in regulation 4(3) rather than conducting a personal interview, which is not referred to as a "function".

33. Accordingly, the 2018 Regulations delegate the functions of the IPO as a determining Member State, set out at Regulation 3(1)(a), to panel members.

**Prejudicial Reference by the First Respondent to the exercise of the Article 17 discretion**

34. In *NVU v. The Refugee Appeals Tribunal* [2020] IESC 46, the Supreme Court determined that the Second Respondent retained the discretionary power, pursuant to Article 17(1) of the Dublin III Regulation, not to enforce a Transfer Decision in respect of an applicant for international protection. The issue of who could exercise this discretion had been a matter of debate for a considerable period. This uncertainty has a relevance to this issue.
35. The Applicant had requested the IPO to exercise the Article 17(1) discretion in his favour so as to not issue a transfer order. On appeal, he made a similar submission to the First Respondent and argued that the First Respondent had the power to exercise this discretion.
36. The First Respondent dealt with the issue as to whether it had the power to exercise the Article 17(1) discretion in the following manner:-

*"14. In relation to the issue as to whether the Tribunal has the authority to exercise the discretion provided for under Article 17(1) of the Dublin III Regulation the Tribunal notes there has been considerable examination thereof in the Irish and European Courts. The Tribunal in this regard refers to the most recent Irish superior courts judgment in NVU which was delivered on 29th June 2019 by the Court of Appeal. In final orders made on 22nd July 2019, an immediate stay lasting until three weeks from the date of the perfection of the relevant order, was placed on the judgment pending a potential appeal by the respondents to the Supreme Court. The effect of this stay is that the operative law at this point in time is in fact the High Court judgment that was under appeal to the Court of Appeal in NVU. In other words, the Tribunal is currently bound by the High Court judgments of O'Regan J in U v. RAT [2017] IEHC 490 (26 June 2017) wherein O'Regan J held as follows (para. 33):*

*"The sovereign discretion referred to in Article 17 of Dublin III has not been vested in ORAC and remains with the Minister for Justice/the Oireachtas"*

15. *As above, the Tribunal is currently bound by the judgment in U v. RAT..., the effect of which is that the Tribunal does not have jurisdiction to exercise an Article 17 discretion. The Tribunal accordingly, finds that this ground of appeal on behalf of the Appellants must fail.*
16. *The Tribunal finds that, if there were not a stay on the Court of Appeal judgment in NVU, or in the event that such a stay were to lapse at some point in the future, the*

*Appellants would, on the very particular facts of their cases not succeed on an application to the Tribunal of the discretion provided for under Article 17.”*

37. The Applicant submits that in a situation where the First Respondent does not have jurisdiction to exercise the Article 17(1) jurisdiction, the comments made by the First Respondent were inappropriate. It is further submitted that these comments should be severed from the First Respondent's decision so as to not prejudice the Second Respondent when she comes to make this determination.
38. The comments made by the First Respondent were made because of the very unusual and particular circumstances at play at the time of its decision which are adequately set out in its decision. The First Respondent was in reality riding two horses. Should the stay placed on the Court of Appeal decision be lifted, thereby giving the First Respondent jurisdiction to exercise the Article 17(1) discretion, it had covered this issue. Ultimately, the NVU case determined that the First Respondent did not have jurisdiction to exercise the Article 17(1) discretion pursuant to the Dublin III Regulation. Accordingly, this comment by the First Respondent has no legal effect.
39. The issue is whether these sentiments should be excised from the decision.
40. While these sentiments are adverse to the Applicant's Article 17(1) application, the reality is that they should have no bearing on the decision making process of the Second Respondent. Any Article 17(1) decision made by her in the future, is a determination of a new issue being made for the first time. The Second Respondent must have regard to that fact. Her decision, is of course, nothing in the nature of an appeal and accordingly, any comment made by the IPO or the First Respondent in relation to the exercise of the Article 17(1) decision simply has no relevance to the Second Respondent's decision. In light of the manner in which the Second Respondent must approach her task in relation to an Article 17(1) application, it appears to me that it is inconceivable that the Second Respondent would be swayed by this negative commentary. Furthermore, the Second Respondent is an entity well used to making decisions in the asylum and immigration arena. As a professional and experienced decision maker within that field, the ability to place irrelevant prejudicial material from her mind is a skill already well-rehearsed and practised by her Department.
41. Accordingly, I find against the Applicant on each of the grounds pursued by him and I decline to grant him the relief sought in his amended Statement of Grounds.