

Ireland - M.A. (a minor) -v- The International Protection Appeals Tribunal & ors, 8 November 2017

Country of Decision:

Ireland

Date of Decision:

08-11-2017

Citation:

[2017] IEHC 677

Additional Citation:

2017 116 JR

Court Name:

High Court

Keywords:

Best interest of the child

Dublin Transfer

Effective access to procedures

Effective remedy (right to)

Relevant Legislative Provisions:

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [1] > [Recital \(13\)](#) [2]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [1] > [Recital \(14\)](#) [3]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [1] > [Recital \(19\)](#) [4]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [1] > [Article 3](#) [5]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [1] > [Article 5](#) [6]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [1] > [Article 6](#) [7]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [1] > [Article 17](#) [8]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#)

Headnote:

The following questions are referred to the Court of Justice of the EU for a preliminary ruling:

- (i) when dealing with transfer of a protection applicant under regulation 604/2013 to the UK, is a national decision-maker, in considering any issues arising in relation to the discretion under art. 17 and/or any issues of protection of fundamental rights in the UK, required to disregard circumstances as they stand at the time of such consideration in relation to the proposed withdrawal of the UK from the EU;
- (ii) does the concept of the *determining member state* in regulation 614/2013 include the role of the member state in exercising the power recognised or conferred by art. 17 of the regulation;
- (iii) do the functions of a member state under art. 6 of regulation 604/2013 include the power recognised or conferred by art. 17 of the regulation;
- (iv) does the concept of an effective remedy apply to a first instance decision under art. 17 of regulation 604/2013 such that an appeal or equivalent remedy must be made available against such a decision and/or such that national legislation providing for an appellate procedure against a first instance decision under the regulation should be construed as encompassing an appeal from a decision under art. 17;
- (v) does art. 20(3) of regulation 604/2013 have the effect that in the absence of any evidence to displace a presumption that it is in the best interests of a child to treat his or her situation as indissociable from that of the parents, the national decision maker is not required to consider such best interests separately from the parents as a discrete issue or as a starting point for consideration of whether the transfer should be take place.

Facts:

The case concerns three applicants, a wife, husband and child. The parents had been living in the UK on a student and dependant visa respectively and their child had been born in the UK. Following on from the closure of the college the wife attended, the applicants went to Ireland and applied for asylum in the country. The Refugee Applications Commissioner requested the UK authorities to take charge of the applicants. The applicants appealed the decision to transfer to the International Protection Appeals Tribunal, relying primarily on Article 17 of the Dublin Regulation and on the UK's withdrawal from the European Union. This appeal was rejected by the Tribunal who held that it had no jurisdiction to exercise discretion in relation to Article 17.

Decision & Reasoning:

In examining the wording of both the Dublin Regulation and respective national legislation, Humphreys J notes that it is not clear with whom the Article 17 function lies. According to domestic law a word or expression used in the regulations and also in the EU regulation should have the same meaning as in the EU regulation. Thus the allocation of responsibility under Article 17 will depend on the meaning of *determining Member State*. With this in mind Humphreys J states that the drafting of the domestic regulations are very unclear and there is an urgent need for clarification since the Dublin system is not functioning as envisaged by EU law. Humphreys J advises that the Minister assess the possibility of making new regulations to determine who should

exercise Article 17, which would also confer on applicants the possibility to appeal a decision where Article 17 is used.

The High Court proceeds with its reasoning in referring the five questions to the CJEU and its proposed answers to the questions:

1. In its examination of whether any consideration should be had to the proposed withdrawal of the UK from the EU when considering the discretion under Article 17 of the Dublin Regulation, the Court is of the opinion that when exercising any discretion under the Regulation and when considering the likely protections of the rights of persons affected, the decision maker should take into account all relevant circumstances. This would mean that the decision maker should not be prevented from taking into account the likely situation arising post-withdrawal of the UK from the EU. Thus, according to the Court, the Tribunal should have considered any risk in relation to the protection the applicants would likely receive following on from the withdrawal process.
2. The Court asks whether the concept of 'determining member state' in the Dublin Regulation includes the member state insofar as it is exercising functions under Article 17 and according to Humphreys J, who relies on CK and Others, the concept does include the determination process under Article 17. Therefore, this would mean that the Refugee Applications Commissioner in Ireland have jurisdiction to determine Article 17 issues.
3. In respect of the third question and the interplay between Article 6 of the Dublin Regulation and Article 17, in particular whether the functions conferred by Article 6 include the exercise of the discretion under Article 17, the Court, again, rules that it does.
4. The Court goes on to ask the CJEU whether a first instance decision made under Article 17 encompasses the right to an effective remedy. In the Irish context there is no appeal against a decision relying on Article 17 since, according to the State, the only appeal that can be made is against a transfer decision not an Article 17 decision. According to the Court this interpretation is erroneous and in light of C.K. and Others an effective remedy should apply to any first instance decision under Article 17.
5. Lastly, the Court asks whether in light of Article 20(3) the best interests of the child should be considered as indissociable or dissociable from that of the parents. According to the Court, Article 20(3) does not require the decision maker to separately consider the child's position unless there is a reason to do otherwise. Therefore, in the absence of positive evidence to displace the presumption of indissociability, there is no requirement to consider the best interests of the child as a separate or discrete issue or as a starting point.

As a final remark the High Court request either the urgent or expedited procedure to be applied in this case given that the child is being examined for signs of autism, that the Dublin Regulation process requires expedition, that the UK withdrawal process has a deadline and that there is a backlog of asylum cases in Ireland which depend on the resolution of the Article 17 issue.

Outcome:

The High Court refers the questions to the CJEU for a preliminary ruling.

Subsequent Proceedings :

The case reference before the CJEU is [C-661/17](#) [10]. The CJEU issued a judgment on 23 January 2019; you can read the EDAL summary of the judgment [here](#) [11].

Attachment(s):



National / Other Legislative Provisions:

[Ireland - European Union \(Dublin System\) Regulations 2014 S.I. No. 525 of 2014](#) [13]

[Ireland - European Union \(Dublin System\) Regulations 2014 S.I. No. 525 of 2014 Reg 6\(9\)](#) [14]

[Ireland - European Union \(Dublin System\) Regulations 2014 S.I. No. 525 of 2014 Reg 2\(1\)](#) [15]

[Ireland - European Union \(Dublin System\) Regulations 2014 S.I. No. 525 of 2014 Reg 3](#) [16]

[Ireland - European Union \(Dublin System\) Regulations 2014 S.I. No. 525 of 2014 Reg 6\(1\)](#) [17]

Links:

[1] <https://www.asylumlawdatabase.eu/node/4037>

[2] https://www.asylumlawdatabase.eu/node/4037#toc_23

[3] https://www.asylumlawdatabase.eu/node/4037#toc_24

[4] https://www.asylumlawdatabase.eu/node/4037#toc_29

[5] https://www.asylumlawdatabase.eu/node/4037#toc_85

[6] https://www.asylumlawdatabase.eu/node/4037#toc_104

[7] https://www.asylumlawdatabase.eu/node/4037#toc_114

[8] https://www.asylumlawdatabase.eu/node/4037#toc_185

[9] https://www.asylumlawdatabase.eu/node/4037#toc_217

[10] <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2018:042:FULL&from=FR>

[11] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-66117-ma-others-23-january-2019>

[12]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/M.A.%20%28%20a%20minor%20%29%20-v-%20The%20International%20Protection%20Appeals%20Tribunal%20%26%20ors.docx>

[13] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/ireland-european-union-dublin-system-regulations-2014-si-no-525-2014>

[14] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/ireland-european-union-dublin-system-regulations-2014-si-no-525-201-0>

[15] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/ireland-european-union-dublin-system-regulations-2014-si-no-525-201-1>

[16] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/ireland-european-union-dublin-system-regulations-2014-si-no-525-201-2>

[17] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/ireland-european-union-dublin-system-regulations-2014-si-no-525-201-3>